DOCKET

SUPREME COURT
OF THE UNITED STATES

No 10-313
Vide 10-329
Title Talk America Inc Petitioner
v
Michigan Bell Telephone Company dba AT&T Michigan
Docketed September 2 2010
Lower Ct United States Court of Appeals for the Sixth Circuit
Case Nos (07-2469 07-2473)
Decision Date February 23 2010
Rehearing Denied June 2 2010

Questions Presented

---Date---	-------Proceedings and Orders---------------------
Aug 31 2010	Petition for a writ of certiorari filed (Response due October 4 2010)
Sep 30 2010	Order extending time to file response to petition to and including November 1 2010
Nov 1 2010	Brief of respondent Michigan Bell Telephone Company dba AT&T Michigan in opposition filed VIDED
Nov 15 2010	DISTRIBUTED for Conference of December 3 2010
Dec 6 2010	DISTRIBUTED for Conference of December 10 2010
Dec 10 2010	Petition GRANTED The petition for a writ of certiorari in No 10-329 is granted The cases are consolidated and a total of one hour is allotted for oral argument Justice Kagan took no part in the consideration or decision of this petition
Dec 20 2010	Consent to the filing of amicus curiae briefs in support of either party or neither party received from counsel for petitioners Isiogu et al VIDED
Dec 23 2010	SET FOR ARGUMENT ON Wednesday, March 30, 2011
Jan 4 2011	Consent to the filing of amicus curiae briefs in support of either party or of neither party received from counsel for petitioner Talk America Inc VIDED
Jan 14 2011	Motion to dispense with printing the joint appendix filed by petitioners VIDED
Jan 18 2011	The time to file the joint appendix and petitioners' briefs on the merits is extended to and including January 27 2011 VIDED
Jan 18 2011	The time to file respondents' brief on the merits is extended to and including March 1 2011 VIDED
Jan 24 2011	Motion to dispense with printing the joint appendix filed by petitioners GRANTED Justice Kagan took no part in the consideration or decision of this motion

Jan 27 2011	Brief of petitioner Talk America, Inc. filed.
Jan 31 2011	Record received from U.S.C.A. for 6th Circuit. (1 box)
Feb 3 2011	Brief amicus curiae of COMPTEL filed. VIDED.
Feb 3 2011	Brief amicus curiae of the United States filed. VIDED.
Feb 3 2011	Brief amicus curiae of California Public Utilities Commission filed. VIDED. (Distributed)
Feb 3 2011	Brief amicus curiae of Sprint Nextel Corporation filed. VIDED. (Distributed)
Feb 4 2011	CIRCULATED.
Feb 4 2011	Motion of the Acting Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed. VIDED.
Mar 1 2011	Brief of respondent Michigan Bell Telephone Company, dba AT&T Michigan filed. VIDED. (Distributed)
Mar 1 2011	Consent to the filing of amicus curiae briefs in support of either party or neither party received from counsel for the respondents. VIDED.
Mar 8 2011	Brief amici curiae of CenturyLink, et al. filed. VIDED. (Distributed)
Mar 8 2011	Brief amicus curiae of Verizon filed. VIDED. (Distributed)
Mar 8 2011	Brief amici curiae of United States Telecom Association and Network Engineers filed. VIDED. (Distributed)
Mar 8 2011	Brief amici curiae of Administrative Law Professors filed. VIDED. (Distributed)
Mar 16 2011	Recor from U.S.D.C. for Eastern District fo Michigan is electronic.
Mar 18 2011	Motion of the Acting Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED. Justice Kagan took no part in the consideration or decision of this motion.
Mar 23 2011	Reply of petitioner Talk America, Inc. filed. (Distributed)
Mar 30 2011	Argued. For petitioner: John J. Bursch, Solicitor General, Lansing, Mich.; and Eric D. Miller, Assistant to the Solicitor General, Department of Justice, Washington, D.C. (for United States, as amicus curiae.)

PETITION
FOR
WRIT OF
CERTIORARI

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Supreme Court, U.S.
FILED

AUG 31 2010

OFFICE OF THE CLERK

No. 10-313

IN THE

Supreme Court of the United States

TALK AMERICA INC.,
Petitioner,

v.

MICHIGAN BELL TELEPHONE COMPANY, d/b/a
AT&T MICHIGAN,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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August 31, 2010

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

QUESTION PRESENTED

Was the Michigan Public Service Commission barred from requiring incumbent local exchange carriers ("ILECs") to offer their competitors telecommunications facilities known as "entrance facilities" at cost-based rates under § 251(c)(2) of the Telecommunications Act of 1996 as a result of a Federal Communications Commission rule eliminating ILECs' obligation to provide similar facilities under § 251(c)(3) when they are used by competitors for a different statutory purpose?

PARTIES TO THE PROCEEDING

In addition to Talk America Inc., Covad Communications Company and XO Communications were Intervenors-Defendants-Appellants in the court of appeals. Michigan Bell Telephone Company d/b/a AT&T Michigan was Plaintiff-Appellee in the court of appeals. The following parties, or their predecessors in office, were Defendants-Appellants in the court of appeals: Michigan Public Service Commission; J. Peter Lark, Laura Chappelle, and Monica Martinez, in their official capacities as Commissioners of the Michigan Public Service Commission. Commissioners currently appointed to the Michigan Public Service Commission are Chairman Orjiakor N. Isiogu, Commissioners Monica Martinez, and Greg R. White. In addition, McLeodUSA Telecommunications Services, Inc. and TDS Metrocom, LLC were Intervenors in the court of appeals.

CORPORATE DISCLOSURE STATEMENT

Pursuant to this Court's Rule 26, undersigned counsel states that no publicly held company owns 10% or more of the stock in Talk America Inc.

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IN THE

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No. 10-___

TALK AMERICA INC.,
Petitioner,
v.
MICHIGAN BELL TELEPHONE COMPANY, d/b/a
AT&T MICHIGAN,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

Petitioner Talk America Inc. ("Talk America"), respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The Court of Appeals Opinion is reported at 597 F.3d 370 and is reproduced in the Appendix herein at App. 1a. The order denying the motion for rehearing en banc is unreported, and is reproduced in the Appendix herein at App. 90a. The decision of the U.S. District Court for the Eastern District of Michigan is also unreported, and is reproduced in the Appendix herein at App. 143a.

JURISDICTION

The district court had jurisdiction pursuant to 47 U.S.C. § 252(e)(6) and 28 U.S.C. §§ 1331 and 1343(a)(3). The court of appeals had jurisdiction to review the district court's final judgment pursuant to 28 U.S.C. § 1291. The court of appeals filed its opinion on February 23, 2010, and it denied petitioner's timely filed petition for rehearing en banc on June 2, 2010. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The pertinent provisions of the Telecommunications Act of 1996, 47 U.S.C. §§ 251-252, are set forth in the Appendix, at App. 92a.

STATEMENT

This case presents a question of federal law, arising under the Telecommunications Act of 1996. Since 2008, the courts of appeals had unanimously held that federal law requires incumbent local exchange carriers ("ILECs") to offer "entrance facilities" to competitive local exchange carriers ("CLECs") at cost-based rates, for the purpose of interconnecting the respective LECs' networks.

On February 23, 2010, the Sixth Circuit, in a split panel decision, and over the vigorous dissent of Judge Jeffrey Sutton, rejected precedent established by the 2008 decisions of the Seventh and Eighth Circuits. The circuit split resulting from the Sixth Circuit's decision intensified when the Ninth Circuit issued its decision on precisely the same issue on March 4, 2010. The Ninth Circuit, consistent with the Seventh and Eighth Circuit decisions, as well as the Federal Communications Commission's ("FCC") interpretations of its applicable regulations, held that entrance facilities must be made available by ILECs (such as AT&T or Verizon) to CLECs (such as petitioner Talk America), at cost-based rates to facilitate interconnection of competing telecommunications networks.

The Sixth Circuit panel majority's decision is an outlier in two ways. First, it effectively rewrites provisions of the Telecommunications Act of 1996 that ensure efficient, non-discriminatory interconnection of the networks of competing providers of voice and data services. The other courts of appeals reviewing the issue held that federal law and the FCC's implementing regulations required incumbents to offer entrance facilities to competitors at cost-based rates to facilitate the seamless, interconnected telecommunications networks contemplated by the Telecommunications Act.

The Sixth Circuit's contrary view of the same provisions of the Telecommunications Act has significant ramifications in the telecommunications industry. For CLECs such as petitioner Talk America, the decision has substantial detrimental financial and competitive consequences. For all competitive and incumbent LECs, the decision re-opens what had been a settled legal issue, and threatens to drive up the cost of market entry by CLECs. The decision creates business uncertainty not only for companies operating in the Sixth Circuit's states of Michigan, Kentucky, Ohio, and Tennessee, but also for those operating in the twenty-seven states within the jurisdiction of the courts of appeals that have not faced the issue.

Second, contrary to this Court's precedents, the Sixth Circuit refused to defer to the FCC's interpretation of its own regulations regarding the use of entrance facilities for interconnection of LEC networks. By contrast, the Ninth Circuit held that the FCC's interpretation of its applicable regulation is entitled to deference, based on this Court's decision in *Auer v. Robbins*, 519 U.S. 452 (1997). Left undisturbed, the Sixth Circuit panel majority's misguided approach to *Auer* deference could have far-reaching implications for future cases reviewing regulations promulgated by the FCC or any other federal agency.

1. Prior to the Sixth Circuit's decision in *Michigan Bell Tel. Co. v. Covad Communications Co.*, 597 F.3d 370 (2010) App. at 1a. ("*Michigan Bell*"), the meaning of the federal law and rules regarding the availability and pricing of entrance facilities was settled. There is no dispute that an entrance facility is a "high capacity wire that links telephone networks." *Pacific Bell Tel. Co. v. California Pub. Utils. Comm'n*, 597 F.3d 958, 963 (9th Cir. 2010) App. at 52a. ("*Pacific Bell*"). More specifically, as the Seventh Circuit explained:

> An "entrance facility" is a connection between a switch maintained by an ILEC and a switch maintained by a CLEC. In other words, it is a means of transferring traffic from one carrier's network to another. The connection may be by copper cable, fiber-optic cable, or radio-frequency link. The connection may be long or short . . . . ILECs built entrance facilities to comply with their obligation to interchange traffic among networks.

Illinois Bell Tel. Co. v. Box, 526 F.3d 1069, 1071 (7th Cir. 2008) App. at 82a. ("*Illinois Bell*"). An entrance facility is "a means of transferring traffic from one carrier's network to another's, and facilitates an

ILEC's obligation under the Act to interchange traffic among networks." *Southwestern Bell Tel. Co. v. Missouri Pub. Serv. Comm'n*, 530 F.3d 676, 681 (8th Cir. 2008), *cert. denied on other grounds*, 129 S. Ct. 971 (2009) App. at 72a. ("*Southwestern Bell*").

An entrance facility "may be used for two distinct purposes," as described by the *Pacific Bell* court:

> First, a competitive LEC can use an entrance facility for interconnection – that is, to link the competitive LEC's network with that of an incumbent LEC so that the competitive LEC's customers may reach the incumbent LEC's customers. ... Second, a competitive LEC can use an entrance facility for what the industry calls "backhauling." In the case of backhauling, the competitive LEC uses the entrance facility to permit its *own* customers to reach *one another* over the incumbent LEC's network.

Pacific Bell, 597 F.3d at 963 (citations omitted; emphasis in original).[1] App. at 52a-53a. ILEC systems are able to distinguish the uses to which a CLEC puts a leased entrance facility. "[ILECs] are capable of screening out calls that would be used for backhauling. A computer identifies the destination of the call, and, if the call is bound for a computer of the competitive LEC, the computer can screen out the call." *Id.*, at n.8. App. at 53a. *See also Illinois Bell*, at 1071, App. at 84a. ("... ILECs can detect and block any attempted use of an entrance facility for backhauling.")

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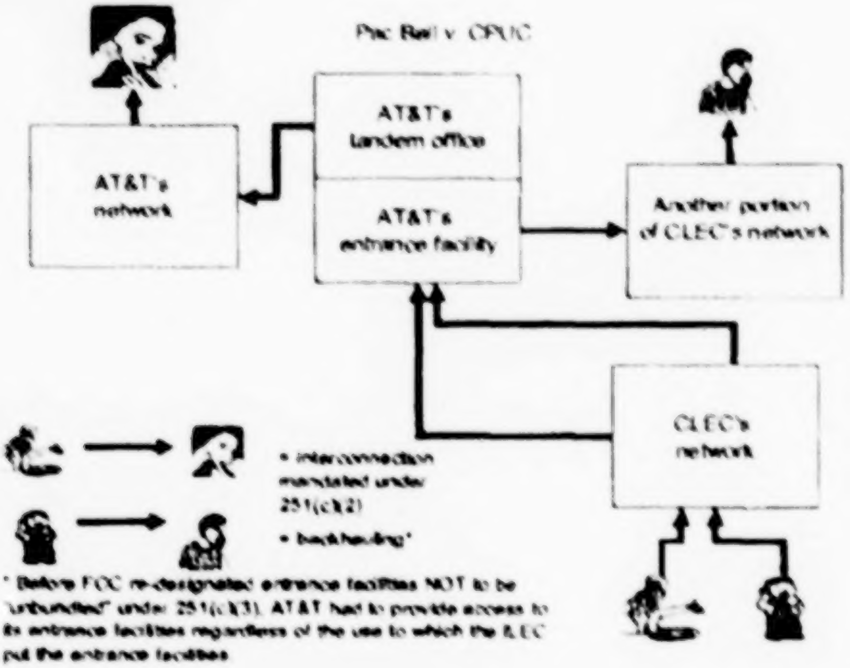
[1] As the Seventh Circuit notes in *Illinois Bell*, the use of the term "backhauling" may be misleading: "intra-CLEC traffic is related only loosely to loading freight on a truck, train, or boat at its destination for delivery to the vehicle's point of origin." *Illinois Bell*, 526 F.3d at 1071, App. at 83a.

The *Pacific Bell* decision, 597 F.3d at 964, App. at 53a, includes an instructive diagram depicting the different uses of entrance facilities, which is reproduced below:


Pac Bell v. CPUC
AT&T's network
AT&T's tandem office
AT&T's entrance facility
Another portion of CLEC's network
CLEC's network
• interconnection mandated under 251(c)(2)
• backhauling*
* Before FCC re-designated entrance facilities NOT to be "unbundled" under 251(c)(3), AT&T had to provide access to its entrance facilities regardless of the use to which the CLEC put the entrance facilities

2. The two distinct functions entrance facilities can be used to perform trigger two independent legal requirements under § 251 of the Telecommunications Act. Under § 251, ILECs "are subject to a host of duties intended to facilitate market entry"; "foremost among these duties is the LEC's obligation under [§ 251(c)] to share its network with competitors." *AT&T Corp. v. Iowa Utils. Board*, 525 U.S. 366, 371 (1999). Section 251 requires that ILECs lease certain facilities to CLECs, and charge "just and reasonable" lease rates based upon the Total Element Long Run Incremental Cost ("TELRIC") methodology adopted

by the FCC. *See Verizon Communications v. FCC*, 535 U.S. 467, 489 (2002). Section 251 requires TELRIC rates for the leasing of facilities used to provide interconnection (47 U.S.C. § 251(c)(2), App. at 94a) and for facilities utilized as unbundled network elements ("UNEs") (47 U.S.C. § 251(c)(3), *id.*). Entrance facilities used for interconnection purposes are subject to § 251(c)(2), and entrance facilities used for "backhauling" CLEC traffic are designated as UNEs subject to § 251(c)(3). The duties imposed on ILECs under "§ 251(c)(2) and 251(c)(3) are independent" obligations under the statute. *Pacific Bell*, 597 F.3d at 967, App. at 59a; *see Southwestern Bell*, 530 F.3d at 683-84, App at 78a-79a.

The § 251(c)(2) interconnection requirement provides that each ILEC "has the duty to provide, for the facilities and equipment of any requesting telecommunications carrier, interconnection with the local exchange network." 47 U.S.C. § 251(c)(2). The FCC's implementing regulations define "interconnection" as "the linking of two networks for the mutual exchange of traffic." 47 C.F.R. § 51.5. Furthermore, the FCC's regulations provide that ILECs must provide CLECs "any technically feasible method of obtaining interconnection." *Id.*, § 51.321(a).

Interconnection is essential to a competitive telecommunications market. As the *Pacific Bell* court explained:

> Without the ability to link its network to that of the incumbent LEC, the competitive LEC would have little prospect of selling its telephone services, to say nothing of competing for the customers of the incumbent LEC. A local telephone service is of little use if it cannot connect to other local telephone users.

Pacific Bell, 597 F.3d at 961, App. at 48a. While entrance facilities are not mentioned specifically in the FCC's interconnection regulations, entrance facilities are "designed for the very purpose of linking two carriers' networks," which "meets the requirement of feasibility" under the FCC's regulations. *Illinois Bell*, 526 F.3d at 1072, App. at 84a. Based on these considerations, the Seventh, Eighth, and Ninth Circuits logically concluded that the statute and regulations "authorize state public utilities commissions to order incumbent LECs to lease entrance facilities to competitive LECs at regulated rates for purposes of interconnection." *Pacific Bell*, 597 F.3d at 965, App. at 56a. *See Southwestern Bell*, 530 F.3d at 684, App. at 79a; *Illinois Bell*, 526 F.3d at 1071-72, App. at 84a-85a. *See also Michigan Bell*, 597 F.3d at 388-90, App. at 39a-40a (in his dissent, Judge Sutton concurs in the legal analysis supporting the decisions in *Illinois Bell*, *Pacific Bell*, and *Southwestern Bell*).

The § 251(c)(3) unbundling requirement provides that ILECs have "[t]he duty to provide, to any requesting telecommunications carrier for the provision of a telecommunications service, nondiscriminatory access to network elements on an unbundled basis." 47 U.S.C. § 251(c)(3). Network elements provided on an unbundled basis are known in the industry as "UNEs." The statutory purpose of unbundling is to:

> [P]ermit competitive LECs to lease, at regulated cost-based rates, parts of the incumbent's network, such as telephone wires, call exchanges, and routing systems. This provision promotes competition by allowing a competitive LEC to enter the telephone service market without having first to overcome capital barriers to entry,

> i.e., without having to construct, at high cost, every component necessary to operate a network.

Pacific Bell, 597 F.3d at 962. App. at 49a.

The statute also provides, however, that before an ILEC is obligated to provide any network element to competitors as a UNE under § 251(c)(3), the FCC must make a finding that unavailability of the UNE at TELRIC rates would "impair" competition. *Id.*, at § 251(d)(2)(B). Importantly, the interconnection provisions of the statute discussed above do not include this "impairment" standard; it's applicability is unique to the FCC's determinations regarding the ILECs' obligation to provide UNEs under § 251(c)(3).

The FCC addressed the question of whether ILECs must make entrance facilities available as UNEs for purposes of backhauling intra-CLEC traffic in several FCC unbundling orders. As it pertains to this case, the key FCC decision is the 2005 order known in the industry as the "*Triennial Review Remand Order*" ("*TRRO*"). *See* Order on Remand, *In the Matter of Unbundled Access to Network Elements, Review of Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 20 FCC Rcd 2533 (2005). In the *TRRO*, the FCC "concluded that CLECs do not need entrance facilities for backhauling and should build their own equipment for handling CLEC-to-CLEC traffic." *Illinois Bell*, 526 F.3d at 1071. App. at 83a.

As it made clear that ILECs did not need to provide entrance facilities as UNEs, the FCC also addressed "the original (and principal) use of an entrance facility," the linking of networks "to allow CLEC-to-ILEC (and ILEC-to-CLEC traffic)." *Illinois Bell*, 526 F.3d 1071. App. at 83a. On that issue, the FCC stated:

> [O]ur finding of non-impairment with respect to entrance facilities does not alter the right of [CLECs] to obtain interconnection facilities pursuant to section 251(c)(2) for the transmission and routing of telephone exchange service and exchange access service. Thus, [CLECs] will have access to these facilities at cost-based rates to the extent that they require them to interconnect with the [ILEC's] network.

TRRO, at ¶ 140. The FCC made clear that its decision that entrance facilities need no longer be made available as UNEs pursuant to § 251(c)(3) did not alter the availability of entrance facilities to be used for interconnection pursuant to § 251(c)(2).

3. The FCC regulations implementing the interconnection and unbundling provisions of § 251(c) have very different histories. Interconnection regulations under § 251(c)(2) have remained relatively stable since the FCC issued its 1996 Local Competition Order, which included the first set of regulations promulgated under the Telecommunications Act. *See Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, First Report and Order, 11 FCC Rcd 15499, 15614-15, ¶ 224 (1996) ("*Local Competition Order*"). By contrast, the regulations governing availability of UNEs have been the subject of extensive litigation in the courts, including this Court's decision in *AT&T Corp. v. Iowa Utils. Board*, 525 U.S. 366 (1999). The legal controversies over UNEs culminated in the D.C. Circuit's approval of revised FCC regulations in *Covad Communications Co. v. FCC*, 450 F.3d 528 (D.C. Cir. 2006). The FCC regulations affirmed by the D.C. Circuit were those issued by the FCC in 2005, in the *TRRO* order discussed above.

The major changes in federal rules governing UNEs that were included in the *TRRO* generated numerous regulatory proceedings at state utility commissions nationwide. Under the Telecommunications Act, state utility commissions have the role of approving "interconnection agreements" that delineate the rates, terms, and conditions under which an ILEC and CLEC do business. Interconnection agreements cover topics including interconnection, unbundling, and the other mandates of § 251(c) of the Act. See 47 U.S.C. § 252, App. at 102a; *Iowa Utils. Bd.*, 525 U.S. at 385 ("[T]he 1996 Act entrusts state commissions with the job of approving interconnection agreements ..."). If a CLEC and ILEC cannot come to terms, the state commission is authorized to resolve the parties' disputes in "arbitration" proceedings, the contours of which are detailed in § 252. The results of the state commission determinations reached in § 252 proceedings are reviewable in the federal courts. 47 U.S.C. § 252(e).

When the FCC changed the rules governing UNE availability in the *TRRO*, its decisions required the revision of the thousands of interconnection agreements executed by ILECs and CLECs. When the ILECs and CLECs could not agree on how the FCC's new rules should be reflected in their agreements, they turned to state commissions to resolve the disputes. The case below began with such a dispute resolution proceeding, involving ILECs and CLECs operating in Michigan.

4. The Michigan Public Service Commission ("MPSC") initiated a proceeding to address the parties' disputes over implementation of the *TRRO*. Michigan Public Service Commission, Case No. U-

14447, *In the Matter, on the Commission's Own Motion, To Commence A Collaborative Proceeding To Monitor and Facilitate Implementation of Accessible Letters Issued By SBC Michigan and Verizon.* Among the numerous disputed issues was the question of whether Michigan Bell had the right to price entrance facilities used for interconnection above the TELRIC rate, *i.e.*, the cost-based rate, required pursuant to § 251(c)(2). Michigan Bell argued that the *TRRO*, when it eliminated the ILECs' obligation to provide entrance facilities as UNEs, thereby eliminated any obligation to provide entrance facilities at TELRIC rates for any purpose, including interconnection.

The MPSC rejected Michigan Bell's arguments, and concluded that the FCC's decision eliminating the ILECs' duty to provide entrance facilities as UNEs under § 251(c)(3) nonetheless left intact the ILECs' separate obligation to provide entrance facilities used for purposes of interconnection under § 251(c)(2). *See* MPSC Case No. U-14447, Arbitration Order, at 11-13 (Sept. 20, 2005), App., at 183a-185a.

5. On April 28, 2006, Michigan Bell appealed portions of the MPSC Arbitration Order to the United States District Court for the Eastern District of Michigan. Among the portions of the Order Michigan Bell appealed was the MPSC's ruling requiring Michigan Bell, a/k/a AT&T Michigan, to continue to provide CLECs with entrance facilities at a cost-based rate when those entrance facilities are used for purposes of interconnection under § 251(c)(2). In an unpublished opinion dated September 26, 2007, the District Court issued its Order, including its ruling that the MPSC Arbitration Order did not comply with the rules regarding entrance facilities adopted

by the FCC in its *TRRO*, and that, therefore, the MPSC's ruling on that issue must be set aside. *See* App. at 156a-158a. The District Court entered its final judgment on October 23, 2007, granting, in part, Michigan Bell's motion for summary judgment and enjoining the MPSC from enforcing those portions of its Arbitration Order which the district court ruled to be unlawful.

6. The district court's decision on entrance facilities was timely appealed to the Sixth Circuit by the MPSC, and by a group of CLECs, including petitioner Talk America. While the appeal was pending in the Sixth Circuit, other decisions regarding the entrance facilities dispute were percolating from state utility commissions up through the courts of appeals. In 2006, a Missouri Public Service Commission order that reached the same conclusion on entrance facilities as the MPSC Arbitration Order was affirmed by the U.S. District Court for the Eastern District of Missouri, in *Southwestern Bell Tel. Co. v. Missouri Pub. Serv. Comm'n*, 461 F. Supp.2d 1055 (E.D. Mo. 2006). In 2008, the Eighth Circuit affirmed the district court's conclusion that the *TRRO* did not change the § 251(c)(2) requirement that ILECs make entrance facilities available at TELRIC rates when used for interconnection. *Southwestern Bell*, 530 F.3d at 683-84. App. at 78a-79a. In an unpublished opinion in 2007, the U.S. District Court for the Northern District of Illinois affirmed an Illinois Commerce Commission decision that reached the same legal conclusion as the MPSC Arbitration Order. The Illinois district court's decision was affirmed by the Seventh Circuit in 2008. *Illinois Bell*, 526 F.3d at 1071-72. App. at 83a. In 2008, the U.S. District Court for the Northern District of California, also in an unpublished opinion, affirmed a California

Public Utilities Commission decision that mirrored the MPSC Arbitration Order. The California district court's decision was ultimately affirmed by the Ninth Circuit in *Pacific Bell*, 597 F.3d at 965-69. App. at 56a-63a. In summary, a consensus was rapidly developing in the district courts and the courts of appeals that supported the conclusion reached by the MPSC Arbitration Award regarding entrance facilities.

7. A three-judge panel of the Sixth Circuit heard oral argument in this case on December 10, 2008. At oral argument, panel members queried counsel whether it would be productive to seek input from the FCC, since the meaning of the *TRRO*, as well as other FCC orders and rules, was at issue in the case. On the same day as oral argument, the Clerk of the Sixth Circuit sent a letter to the General Counsel of the FCC inviting the FCC to file a brief as *amicus curiae*, stating its position on the issue on appeal.

8. The FCC filed its invited *amicus* brief on April 3, 2009. The FCC's brief is included in the Appendix at 112a. The FCC urged the Sixth Circuit to reverse the district court, stating its position in no uncertain terms:

> The FCC in paragraph 140 of the *TRRO* declared explicitly that its rule relieving incumbent LECs of the duty to unbundle entrance facilities and its non-impairment finding "do[] not alter the right of competitive LECs to obtain interconnection facilities pursuant to section 251(c)(2)." The FCC went on to state categorically that "competitive LECs will have access to these facilities at cost-based rates to the extent that they require them to interconnect with the incumbent LEC's network." The MPSC was correct in accepting the

> agency's authoritative interpretation of the scope of the unbundling rule and its specification of the incumbent LECs' section 251(c)(2) obligations.

Brief for Amici Curiae Federal Communications Commission in Support of Defendant-Appellants and Reversal of the District Court, at 10-11 (April 3, 2009), App. at 128a-129a. ("FCC Brief"). The FCC urged that "the district court (in contrast to two circuit courts previously confronting the same issue) improperly disregarded the FCC's authoritative construction of its own rules and authorizing statute," and that there was no question that the Sixth Circuit should reverse the district court's erroneous decision. FCC Brief, at 2. App. at 120a.

The FCC Brief detailed the errors in the district court's interpretation of FCC orders and rules, and also correctly noted that the district court decision failed to apply the level of deference to the FCC's decisions that this Court has held is required:

> The FCC ... reasonably determined in the *TRRO* both that competitive LECs are not impaired without access to entrance facilities (thus relieving them of the obligation to provide those facilities to competitive carriers as UNEs under section 251(c)(3)) and that this determination had no effect on the incumbent LECs' independent obligation to provide interconnection under section 251(c)(2). Because that regulatory interpretation "reflect[s] a 'fair and considered judgment' and [is] not 'plainly erroneous or inconsistent' with the unbundling rule, that construction is 'controlling.'" The district court erroneously found that the agency's interpretation of the scope of its unbundling regulation "undermines the plain meaning of the rule." The rule refe-

> renced by the court (which states that incumbent LECs need not provide entrance facilities as unbundled network elements) is codified in a section addressing an incumbent LEC's duties "in accordance with section 251(c)(3) of the Act." 47 C.F.R. § 51.319(e). Nothing in that rule suggests that it applies also to an incumbent LEC's separate obligation (embodied in a different rule, 47 C.F.R. § 51.305) to provide interconnection under section 251(c)(2). The FCC's statement in paragraph 140 recognized something that the district court appears to have overlooked: these are two separate statutory obligations that are not necessarily co-extensive.

Id., at 15-16, App., 132a-133a.

9. The case remained pending in the Sixth Circuit until February 23, 2010, when the panel issued its 2-1 decision. The panel majority's opinion rejected the reasoning of the prior on-point decisions of the Seventh and Eighth Circuits in *Illinois Bell* and *Southwestern Bell*. Likewise, the panel majority rejected the FCC's view of the meaning of its own orders and rules, which had been detailed in the FCC's *amicus* brief. Rather than rely on such legal authority, the panel majority conducted its own novel exegesis of the applicable FCC rules and orders, relying largely on an extended (and inaccurate) metaphorical conceit.

The panel majority "re-states" the text of the FCC's order based on its view of "plain meaning," then proceeds to offer a new "translation" of the words in the FCC's order. After positing this new "translation," which, petitioner Talk America submits, inaccurately reads the actual words in the *TRRO*, the panel majority then asks: "So, the question becomes:

does this mean what it says?" *Michigan Bell*, 597 F.3d at 379. App. at 18a. Because it had created the restatement (instead of relying on the actual language used by the FCC), the panel majority, of course, can answer "Yes!" The problem is that the "translation" process replaced the actual terms used by the FCC with other terms that re-frame the meaning intended by the FCC. The exegesis conducted by the panel majority, which it relies on in deciding the case, is not even being conducted on the legal text in question.

The panel majority attempts to "explain" entrance facilities by analogizing the FCC rules governing entrance facilities to an imagined municipal ordinance authorizing users of a public park to plug "big orange extension cords" into "the outlet in your garage" (assuming that your garage is in a house next to the park in question). This purportedly "simple" analogy is set up over several pages of the panel majority's opinion. *Id.*, at 379-81. App. at 18a-21a. The analogy is utterly original: nothing like it is included in the record before the court, nor in any other court decision addressing entrance facilities or other telecommunications issues. As the analogy rolls out, the "big orange extension cord" is, variously, the "entrance facility" or the "interconnection facility," although the panel majority ultimately pauses to note: "to ease the analogy, let's just assume you allowed them [the park-goers] to plug into the surge protector." *Id.* at 380. App. at 20a.

As noted in Judge Sutton's dissent, the panel majority's metaphorical conceit is an admirable attempt to clarify technical issues. *Id.*, at 387. App. at 33a. Petitioner Talk America submits, however, and argued in its motion for rehearing en banc, that the analogy is factually and technically inaccurate, as well as based on legal premises that find no support in the applicable FCC orders and rules. When it affirmed the district court's decision, the panel majority did not let facts or precedent stand in the way of a creative metaphor. It is thus not surprising that, as the panel majority noted, "the MPSC Commissioners, the CLECs, the dissent, and the two Circuit Courts to have considered this all see it another way." *Id.*, at 381. App. at 22a.

10. Judge Sutton's dissent did, indeed, "see it another way." The dissent would have reversed the district court, for reasons consistent with the rationale underlying the decisions of the other courts of appeals. The dissent noted that the majority's view of the FCC's orders and rules "may be a reasonable interpretation." Judge Sutton went on to conclude: "So too, however, is the FCC's competing interpretation, one premised on an interpretation of its own regulations and one that we must respect as a result." *Id.*, at 387, App. at 33a. *citing Auer v. Robbins*, 519 U.S. 452 (1997). The dissent found this case a prime candidate for *Auer* deference, and objected to the panel majority's refusal to show even the slightest deference to the expert agency's interpretation of its own rules.

In footnotes to the majority opinion responding to the dissent, the panel majority takes an extremely narrow view of *Auer* deference. Ultimately, the panel majority contends that the FCC's interpretation of its rule "is so plainly erroneous or inconsistent with the regulation ... that we can only conclude that the FCC has attempted to create a new *de facto* regulation under the guise of interpreting the regulation." *Id.*, at 375, n.6. App. at 10a. The panel majority's bold allegation that the FCC was attempting to improperly alter its rules was supported neither by the facts of this case nor by any other appellate judge who has considered the issues presented in this case.

11. The MPSC and the CLEC intervenors filed timely motions for panel rehearing or rehearing en banc. The motions were denied on June 2, 2010, with Judge Sutton stating that he would have granted rehearing en banc for the same reasons he dissented from the panel majority's opinion. App. at 90a.

12. On March 4, 2010, after the Sixth Circuit issued its opinion but before it denied motions for rehearing en banc, the Ninth Circuit released its decision in *Pacific Bell*. As discussed above, the Ninth Circuit's ruling on the entrance facilities issue is consistent with the 2008 decisions of the Seventh and Eighth Circuits. The *Pacific Bell* decision did not cite or attempt to distinguish the Sixth Circuit's *Michigan Bell* decision.

13. Petitioner Talk America is aware of no other case addressing the entrance facilities issue pending in any of the other courts of appeals.

REASONS FOR GRANTING THE PETITION

I. THE SIXTH CIRCUIT'S DECISION CREATED A DAMAGING DIVISION BETWEEN THE CIRCUITS THAT THIS COURT SHOULD RESOLVE.

As discussed above, the decision of the panel majority in *Michigan Bell* is an outlier. The Sixth Circuit's decision stands apart from the decisions of every other court of appeals to have considered the same issue, as well as from the FCC's authoritative interpretation of its own orders and rules. The contested legal issue is fully fleshed out in the four Circuit court decisions to have considered the status of entrance facilities in light of the FCC's *TRRO* unbundling order. This Court's consideration and resolution of the issue would foster uniformity among the courts of appeals.

The circuit split on this issue is damaging to the telecommunications industry. For CLECs like petitioner Talk America, if the Sixth Circuit's decision stands, the prices it must pay for entrance facilities used for interconnection will be dramatically higher in the four states in the Sixth Circuit than in other states. Unreasonably high prices for interconnection damage all CLECs' ability to compete, contrary to the purpose of the Telecommunications Act.

The circuit split also creates uncertainty in the states outside the four circuits where the issue has been decided. Under the Telecommunications Act, interconnection agreements are negotiated, arbitrated, and approved by state utility commissions on a state-by-state basis. *See* 47 U.S.C. § 252. As interconnection agreements expire, uncertainty regarding the terms and conditions applicable to entrance facilities will generate additional litigation regarding an issue that appeared to be settled until the Sixth Circuit issued its *Michigan Bell* decision. A decision on the issue by this Court would resolve that business uncertainty and prevent unnecessary, repetitive litigation before numerous state utility commissions and federal courts.

II. THE ISSUE PRESENTED IS PURELY ONE OF FEDERAL LAW THAT CAN BE DEFINITIVELY RESOLVED IN THIS CASE.

This case presents the question of whether the FCC rule relieving ILECs of their § 251(c)(3) duty to make entrance facilities available as UNEs bars the MPSC from construing § 251(c)(2) to require an ILEC to provide CLECs with similar facilities at cost-based rates when they are used solely for interconnection. This is undoubtedly a question of federal law, and its resolution does not rely on factual findings in the courts below, or on other factors that would prevent this Court from definitively deciding the issue.

To petitioner Talk America's knowledge, there are no other cases pending before the courts of appeals regarding the entrance facilities issue in this case. Further percolation of the issues in the lower courts is unnecessary: the issues dividing the Sixth Circuit from the other courts of appeals are clearly established. Likewise, the question of how *Auer* deference should apply to the FCC's interpretation of its interconnection regulations is fully developed and crystallized in the contrasting decisions of the Sixth and Ninth Circuits in *Michigan Bell* and *Pacific Bell*.

III. *MICHIGAN BELL* WAS WRONGLY DECIDED BY THE SIXTH CIRCUIT PANEL MAJORITY.

A. The decision of the Sixth Circuit panel majority overlooks or misapprehends legal standards established in long-standing FCC orders and rules.

The panel majority acknowledges that the other courts of appeals to have ruled on the entrance facilities dispute ruled consistently with the position taken in Judge Sutton's dissent. The majority bases its singular view of the law on at least five premises that are contradicted by: (a) long-standing FCC decisions regarding the scope of ILEC obligations to "provide, for the facilities and equipment of any requesting telecommunications carrier, interconnection with the local exchange carrier's network," pursuant to 47 U.S.C. § 251(c)(2); or (b) the FCC's unbundling orders and rules, including the *TRRO* and its predecessor order, the *Triennial Review Order* ("*TRO*"), and the rules promulgated therein. *See Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket Nos. 01-338, 96-98, 98-147, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, 18 FCC Rcd 16978 (2003), *corrected by Errata*, 18 FCC Rcd 19020 (2003) ("*Triennial Review Order*" or "*TRO*").

1. A fundamental and erroneous premise underlying the panel majority's opinion is that "interconnection facilities and entrance facilities are different things." *Michigan Bell*, 597 F.3d at 384, n.13; App. at 27a. This premise underlies the majority's rejection of the decisions of the other circuits upholding TELRIC pricing for entrance facilities used as interconnection facilities. The majority also erroneously concludes that because the term "interconnection facilities" does not appear in the FCC's 2003 *TRO*, that it "is a phrase new to the *TRRO*." *Id.* App. at 25a.

Contrary to the panel majority's assertions, the FCC has long recognized that "entrance facilities" may be a type of "interconnection facilities." Both phrases have been used in FCC orders and rules since the first proceedings implementing the Telecommunications Act. For example, the FCC Common Carrier Bureau arbitrated interconnection disputes between Verizon and various CLECs in Virginia, issuing its order in 2002. In one of those disputes, Verizon and the CLECs disagreed about the terms under which CLECs would provide "entrance facilities" to Verizon. The FCC noted: "These '*entrance facilities' are interconnection facilities* [CLECs] provide to Verizon that are used to transport Verizon-originated traffic to the [CLECs'] networks." *Petition of WorldCom, Inc., Pursuant to Section 252(e)(5) of the Communications Act for Preemption of the Jurisdiction of the Virginia Corporation Commission Regarding Interconnection Disputes With Verizon Virginia Inc., and for Expedited Arbitration*, Memorandum and Order, 17 FCC Rcd 27039, 27069, ¶ 58 (2002) (emphasis supplied). Thus, in 2002, prior to the issuance of the *TRO* and the *TRRO*, the FCC undoubtedly viewed entrance facilities as a subset of "interconnection facilities."

The quoted statement in the 2002 order is neither the first nor the only time the FCC used the term "interconnection facilities" in orders issued prior to the *TRRO*. When it first adopted interconnection rules in 1996, the FCC held that the statutory interconnection duty requires ILECs "to design interconnection facilities to meet the same technical criteria and service standards that are used within their own networks." 47 C.F.R. § 51.305(a)(3); *Local Competition Order*, 11 FCC Rcd 15499, 15614-15, ¶ 224 (1996). Although the FCC did not explicitly define the term "interconnection facilities," a thorough review of the FCC's orders and rules demonstrates that there is no basis for the panel majority's claim that the FCC did not utilize the term "interconnection facilities" prior to the *TRRO*.

2. The panel majority held that once the FCC determined that ILECs were no longer obligated to make entrance facilities available on an unbundled basis pursuant to the "impairment standard" of 47 U.S.C. § 251(c)(3), *i.e.*, available as "UNEs," that this meant that "an ILEC is not obligated to provide entrance facilities at TELRIC rates." *Michigan Bell*, 597 F.3d at 377. App. at 13a. This holding misconstrues the statute and the FCC's rules, which have required, since the *Local Competition Order* in 1996, that ILECs offer interconnection facilities at cost-based, TELRIC rates, and that this statutory obligation is separate and distinct from the ILECs' statutory obligation to make UNEs available when those UNEs satisfy the statute's "impairment" standard.

Section 251(c)(2)(D) requires that ILECs provide interconnection facilities on the "rates, terms and conditions" that comply with the requirements of § 252. 47 U.S.C. § 251(c)(2)(D). App. at 94a. Section 252(d)(1) provides that "the just and reasonable rate for the interconnection of facilities and equipment for purposes of subsection (c)(2) of section 251" shall be cost-based. *Id.*, § 252(d)(1)(A)(i). App. at 105a. In implementing this rate-setting provision, the FCC established the TELRIC methodology. *See Local Competition Order*, 11 FCC Rcd. at 15,844, ¶ 672; *see also* 47 C.F.R. §§ 51.501(a)-.505 (2005) (applying TELRIC to the pricing of interconnection). The FCC concluded that Congress intended to apply the same pricing rules to interconnection and UNEs, based on the plain language of the Act. *See Local Competition Order*, 11 FCC Rcd at 15, 816, ¶ 628; *Southwestern Bell v. Missouri Pub. Serv. Comm'n*, 461 F. Supp. 2d 1055, 1072-73 (E.D. Mo. 2006), *aff'd*, 530 F.3d 676 (8th Cir. 2008), *cert. denied*, 129 S. Ct. 971 (2009).

Thus, when the FCC ruled in the *TRRO* that entrance facilities would no longer be available as UNEs, *see* 47 C.F.R. § 51.319(e)(2)(i), that decision did not alter the requirement that interconnection facilities be priced at TELRIC, nor did it alter the prior FCC determination that entrance facilities constitute a form of interconnection. As Judge Sutton's dissent points out, to read the elimination of entrance facilities as UNEs to include their elimination as interconnection facilities ignores the language of § 51.319(e)(2)(i): the rule speaks only of the ILEC's obligation to "provide a carrier *with unbundled access*," and says nothing about the ILEC's interconnection obligation. *See Michigan Bell*, 597 F.3d at 390, *citing Safeco Ins. Co. of Am. v. Burr*, 551 U.S. 47, 59-60 (2007). App. at 39a. The panel majority overlooks the fact that unbundling and interconnection obligations each present a separate and independent basis for applying TELRIC pricing to wholesale ILEC facilities. Properly recognizing the existence of these separate bases for TELRIC pricing eliminates the conflict the panel majority perceives between the FCC's unbundling rule, which eliminates unbundling of entrance facilities, and the FCC's statement, in *TRRO* ¶ 140, that entrance facilities remain subject to TELRIC pricing when used for interconnection. *See Pacific Bell*, 597 F.3d at 967-68. App. at 57a-58a.

3. The panel majority relies on a factual finding that has no basis in the record of this appeal, is

contrary to the FCC's factual findings, and is inconsistent with the practical industry experience of petitioner Talk America. The panel majority opines that, "at least in our view, entrance facilities are not actually a 'technically feasible means of obtaining interconnection' because they do not connect the CLEC with the ILEC network directly; entrance facilities, when used, connect the CLEC with the interconnection facility." *Michigan Bell*, 597 F.3d at 382, n.12. App. at 24a. The panel majority's view is contradicted by practical reality, where companies like Talk America connect their networks to ILEC networks using entrance facilities running between ILEC and CLEC equipment. The entrance facility is the equipment that provides the "bridge" to the ILEC equipment; there is no intermediary "interconnection facility" that stands between the connection of the entrance facility equipment to the ILEC network.

Petitioner Talk America submits that the record does not include evidence on the technical feasibility of using entrance facilities to interconnect networks because neither the courts nor the FCC have ever held that use of an entrance facility could *not* serve as a "technically feasible method of obtaining interconnection" for purposes of 47 C.F.R. §§ 51.305 or 51.321. To the contrary, the FCC made the opposite fact-finding, based on an extensive evidentiary record, when it stated in the *TRO*, and affirmed in the *TRRO*, that CLECs use entrance facilities "between incumbent LEC networks and their own networks both for interconnection and to backhaul traffic." *TRO*, 20 FCC Rcd at 17203 (¶ 365). The FCC again affirmed its view in the *amicus* brief filed in this case. *See* FCC Brief, at 20, App. at 137a-138a. The panel majority erred in adopting and relying on a counter-factual conclusion regarding the use of entrance facilities for interconnection.

4. The panel majority discounts the conclusion reached by the dissent, as well as by the Seventh, Eighth and Ninth Circuits, that the FCC has applied different rules to what the panel majority characterizes as "the same exact wire," based on the different functions served by the "wire." *Michigan Bell*, 597 F.3d at 382. App. at 24a. The panel majority contends that the FCC's rules do not make distinctions between the different functions that could be served by a single telecommunications facility. That view, however, is flatly contradicted by the FCC's interconnection rules.

For example, in 47 C.F.R. § 51.305(c), the FCC distinguishes between interconnection established for purposes of a carrier "terminating its interexchange traffic" (*i.e.*, long distance calls) and for purposes of "providing to others telephone exchange service or exchange access" (*i.e.*, local calls or network access). Although the same "interconnection" – using the same "facilities and equipment," or the same "wire" – could be used for both purposes, the FCC's rule prohibits the use of the wire for terminating long distance traffic, but permits the use of the wire for offering local services in competition with the ILEC.

When it upheld this aspect of the FCC's rule in *Competitive Telecom. Ass'n v. FCC*, 117 F.3d 1068, 1073 (D.C. Cir. 1997), the D.C. Circuit found that "[o]bviously the services sought, while they might be technologically identical (a question beyond our expertise), are distinct." The different services provided over the same wire, the distinct functions to which the facilities could be put, justified different regulatory treatment under the interconnection rules.

Similarly, the FCC drew a functional distinction in the *TRO* and *TRRO*, finding that entrance facilities should not be available as UNEs (when used to backhaul traffic between a CLEC's customers), but should remain available as an interconnection method subject to TELRIC rates (when used as a CLEC's physical link with the ILEC network for the exchange of traffic).

5. The panel majority erroneously accepts Michigan Bell's view that all an ILEC must do to meet its statutory interconnection obligations is to "merely 'make a plug-in available' for connection with the CLEC's facilities and equipment." *Michigan Bell*, 597 F.3d at 384. App. at 28a. This view is inconsistent with the FCC's long-standing rules and orders regarding the scope of interconnection. As the dissent stated after reviewing the salient FCC rules and orders, "an incumbent's interconnection duty encompasses more than providing competitors with an outlet to plug into." *Id.*, at 389. App. at 38a. Indeed, the FCC's *amicus* brief details its prior rulings establishing the breadth of ILEC interconnection obligations, rulings in which "the FCC consistently has stated that an incumbent LEC, in fulfilling its duty to provide interconnection under section 251(c)(2), may be required to provide facilities to effectuate interconnection," FCC Brief, at 22, App. at 139a., facilities that go far beyond the "wall outlet" imagined in the Majority's "big orange extension cord" analogy.

Settled law supports the summary of the breadth of interconnection obligations stated in the FCC's brief:

> Since the adoption of the 1996 Act, the FCC has consistently found that an incumbent LEC, to fulfill [the] duty to interconnect, may be required

> to provide facilities that are used for the physical linking of the two networks. ... Indeed, the *Local Competition Order* and the implementing rule it adopted require the [ILEC] to provide interconnection not just at any feasible point, but by "any feasible method" of interconnection, such as a "meet point arrangement" by which the [ILEC] must build out its facilities to a designated "meet point."

FCC Brief, at 18-19, App. at 136a-137a (citations omitted).

In addition to disregarding settled FCC rulings, the panel majority also asserts the existence of (and then relies upon) concepts that are completely foreign to the FCC's rules. For example, the panel majority argues that "an ILEC's portion of a meet-point facility ... is an 'interconnection facility,' whereas the CLEC's portion of the meet-point is an 'entrance facility.'" *Michigan Bell*, 597 F.3d at 382, n.11. App. at 24a. This assertion is made without citation to any FCC rule or order, or any other factual or legal authority. In another footnote, the panel majority dismisses the well-established principles embodied in the FCC rules for determining whether interconnection methods are "technically feasible." *Id.*, n.12. App. at 24a-25a.

Each of these substantive legal errors contributed to the panel majority's incorrect conclusion that ILECs need not make entrance facilities available at cost-based rates for interconnection pursuant to § 251(c)(2).

B. The panel majority erred in failing to accord *Auer* deference to the FCC's interpretation of its own orders and rules.

1. The panel majority suggests that the *TRRO* is not entitled to deference because it is an "interpretive rule." Petitioner Talk America agrees with the analysis in Judge Sutton's dissent, which concludes that FCC orders like the *TRRO* constitute "legislative rules," rather than post-hoc agency interpretations of existing rules. Notably, when the FCC adopted the *TRO* and the *TRRO*, the agency officially adopted both the orders (including the disputed *TRRO* ¶ 140) and the rules it promulgated pursuant to the orders. In the context of FCC proceedings, the Commission's "orders" and "rules" are both adopted as legislative acts of the agency.

2. The panel majority contends that *Auer* deference may not be appropriate for legal briefs prepared by administrative agency staff, like the FCC *amicus* brief submitted at the panel's invitation in this case. While the Seventh Circuit opinion cited by the panel majority may have "expressed skepticism" concerning agency briefs or staff memoranda, the decisions of this Court do not share that skepticism. See *Auer*, 519 U.S. at 462 ("Petitioners complain that the Secretary's interpretation comes to us in the form of a legal brief; but that does not, in the circumstances of this case, make it unworthy of deference."). *See also Ford Motor Credit v. Milhollin*, 444 U.S. 555, 566, n.9 (1980) ("it is unrealistic to draw a radical distinction between opinions issued under the imprimatur of the [Federal Reserve] Board and those submitted as official staff memoranda."). Notably, one of this Court's most recent decisions addressing

Auer deference held that an internal agency memorandum between two EPA staff members was entitled to *Auer* deference. See *Coeur Alaska, Inc. v. Southeast Alaska Conservation Council*, -- U.S. --, 129 S.Ct. 2458, 2473 (2009).

3. As this case makes abundantly clear, the federal regulations governing CLECs' business are technical, complex, and frequently controversial. Judicial deference to the expert views of the FCC is important to the administration of justice, but also to provide regulatory certainty to CLECs, ILECs, and other market participants. As Justice Scalia noted last year in his concurring opinion in *Coeur Alaska*: "It is quite impossible to achieve predictable (and relatively litigation-free) administration of the vast body of complex laws committed to the charge of executive agencies without the assurance that reviewing courts will accept reasonable and authoritative agency interpretation of ambiguous provisions." *Id.*, 129 S.Ct. at 2479 (Scalia, J., concurring in part and concurring in the judgment). The panel majority's analysis of *Auer* deference neglects this important principle, and Talk America urges this Court to correct it.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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August 31, 2010

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APPENDIX A

UNITED STATES COURT OF APPEALS,
SIXTH CIRCUIT.

Nos. 07-2469, 07-2473.

MICHIGAN BELL TELEPHONE COMPANY,
Plaintiff-Appellee,

v.

COVAD COMMUNICATIONS COMPANY, *et al.*,
Intervenors Defendants-Appellants,

McLeodUsa Telecommunications Services, Inc., *et al.*,
Intervenors,

J. Peter Lark, Commissioner, *et al.*,
Defendants.

Michigan Bell Telephone Company,
Plaintiff-Appellee,

v.

Laura Chappelle, *et al.*,
Defendants-Appellants,

Covad Communications Company, *et al.*,
Intervenors.

Argued: Dec. 10, 2008.
Decided and Filed: Feb. 23, 2010.
Rehearing and Rehearing En Banc
Denied June 2, 2010.*

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* Judge Sutton would grant rehearing for the reasons stated in his dissent.

Before: BATCHELDER, *Chief Judge*; GILMAN and SUTTON, *Circuit Judges*.

BATCHELDER, C.J., delivered the opinion of the court, in which GILMAN, J., joined. SUTTON, J., delivered a separate dissenting opinion.

OPINION

ALICE M. BATCHELDER, *Chief Judge*.

A state telephone-utility commission and several competitive local exchange carriers appeal a judgment in which the district court vacated the commission's order requiring the incumbent local exchange carrier to provide certain "entrance facilities" at wholesale prices. Finding the appellants' arguments unpersuasive, we AFFIRM.

I

Congress enacted the Telecommunications Act of 1996, 47 U.S.C. § 152 *et seq.*, to mandate "that local service, which was previously operated as a monopoly overseen by the several states, be opened to competition." *MCI Telecom. Corp. v. Bell Atl.*, 271 F.3d 491, 497 (3d Cir.2001). Congress required the incumbent local exchange carriers (ILECs) to cooperate with competitive local exchange carriers (CLECs) to allow the CLECs to enter the market, either by connecting their equipment to the ILEC's existing network or by purchasing or leasing existing network elements and services. *Id.* The ILECs and CLECs, through negotiation or arbitration, enter into "interconnection agreements," which set out the terms, rates, and conditions. *Id.* Congress directed the Federal Communications Commission (FCC) to promulgate implementing regulations, but gave oversight of the interconnection agreements to the state public-utility commissions. *Id.*

In the present case, the ILEC is Michigan Bell; the CLECs are Covad Communications, Talk America, Inc., XO Communications, McLeod USA Telecommunications, and TDS Metrocom; and the state utility commission is the Michigan Public Service Commission (MPSC), for which the individual commissioners were J. Peter Lark, Laura Chappelle, and Monica Martinez. This case concerns the regulation of "entrance facilities," a type of transmission facility that connects a CLEC network with an ILEC network. But, just to be clear, an "entrance facility" is really just a fancy name for a cable or wire used to transport calls from a CLEC switch to an ILEC switch, and this wire can be very short (if the two switches are close together), or it can be very long, stretching for blocks or even miles (if the switches are far apart), depending on the relative locations of the two switches.

As Congress directed, the FCC promulgated regulations regarding interconnection, *see* 47 C.F.R. § 51.1 et seq., and then set about deciding which of the ILEC's network elements must be "unbundled"; that is, which of the ILEC's network elements must be offered for sale or lease to the CLECs at regulated prices or rates.[1] In August 1996, the FCC issued its

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[1] The FCC created a particular set of regulated rates called "Total Element Long Run Incremental Cost" (TELRIC) rates. Thus, "unbundled" means "regulated," which means "at TELRIC rates." *See Verizon Commc'ns, Inc. v. FCC*, 535 U.S. 467, 531, 122 S.Ct. 1646, 152 L.Ed.2d 701 (2002) (citing *AT & T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 394, 119 S.Ct. 721, 142 L.Ed.2d 835 (1999)) ("Bundling is about lease pricing. To provide a network element 'on an unbundled basis' is to lease the element, however described, to a requesting carrier at a stated price specific to that element."); *see also USTA v. FCC* (USTA II),

Local Competition Order, 11 FCC Rcd. 15499, 1996 WL 452885 (Aug. 8, 1996), in which it purported to apply the Act's "impairment test"[2] and—finding impairment everywhere—required the ILECs to unbundle *all* of their interoffice-transmission facilities (which included entrance facilities). But the Supreme Court vacated that order, finding the FCC's analysis of impairment unjustifiably over-broad, and remanded the issue to the FCC to try again. *See AT & T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 119 S.Ct. 721, 142 L.Ed.2d 835 (1999).

Meanwhile, Michigan Bell had begun to provide for the CLECs to connect to its network. In so doing, Michigan Bell added "entrance facilities" (i.e., cables or wires) with which the CLECs could connect, in order to access Michigan Bell's network. Acting pursuant to the FCC's initial directives, Michigan Bell offered its "entrance facilities" to the CLECs at regulated rates.

The FCC, on remand from the *Iowa Utilities Board* decision, again required the ILECs to unbundle all of their interoffice transmission facilities (including entrance facilities), once again under an "impairment test" in which it found impairment everywhere. *See UNE Remand Order*, 15 FCC Rcd. 3696, 1999 WL

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359 F.3d 554, 561-62 (D.C.Cir.2004) (discussing "unbundling requirements").

[2] The "impairment test" states:

> In determining what network elements should be made available [on an unbundled basis, i.e., to the CLECs at TELRIC rates], the [FCC] shall consider, at a minimum, whether . . . the [ILEC's] failure to provide access to such network elements would impair the ability of the [CLEC] to provide the services that it seeks to offer.

47 U.S.C. § 251(d)(2)(B).

1008985 (Nov. 5, 1999). But the reviewing court vacated that order as well, finding the FCC's analysis of impairment unjustifiably over-broad, and remanded the issue to the FCC to try a third time. *See USTA v. FCC*, 290 F.3d 415 (D.C.Cir.2002) ("USTA I").

In its third attempt, on remand from the D.C. Circuit, the FCC—among other things-removed "entrance facilities" from its description of the ILEC network and concluded that an impairment test was not even necessary to hold that entrance facilities need not be unbundled. *See Triennial Review Order* (TRO), 18 FCC Rcd. 16978, 2003 WL 22175730, ¶ 366 n. 1116 (Sept. 17, 2003) ("Our determination here effectively eliminates 'entrance facilities' as UNEs [unbundled network elements] and, therefore, moots the [FCC's pending notice of proposed rule making] insofar as it proposes limitations on obtaining entrance facilities as UNEs."). But the reviewing court vacated the order yet again, finding that the FCC's exclusion of entrance facilities from the impairment analysis was improper and directing that the FCC must conduct an impairment analysis for entrance facilities. *See USTA v. FCC*, 359 F.3d 554 (D.C.Cir.2004) ("*USTA II*").

Consequently, the FCC issued a fourth order, the *Triennial Review Remand Order (TRRO)*, 20 FCC Rcd. 2533, 2005 WL 289015 (Feb. 4, 2005), in which it reestablished that entrance facilities are a part of the ILEC network, but found that unbundled access was not necessary because the CLECs were not impaired by paying competitive rates for the use of entrance facilities.[3] At the conclusion of this finding, however, the FCC included the following paragraph:

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[3] "In fact, the [*USTA II*] court expressed skepticism that incumbent LECs should be required to build entrance facilities

We note in addition that our finding of non-impairment with respect to entrance facilities does not alter the right of competitive LECs to obtain interconnection facilities pursuant to section 251(c)(2) for the transmission and routing of telephone exchange service and exchange access service. Thus, competitive LECs will have access to these [interconnection] facilities[4] at cost-based rates to the extent that they require them to interconnect with the incumbent LEC's network.

As mentioned previously, Michigan Bell had provided entrance facilities for some time, and had been charging the CLECs regulated (TELRIC) rates for use of those entrance facilities. But, in light of the *TRRO*, Michigan Bell decided that it would henceforth charge higher (i.e., competitive) rates for the entrance facilities it was providing.[5] Thus, Michigan

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under any circumstances." TRRO, 20 FCC Rcd. 2533, 2005 WL 289015, ¶ 137 n. 383 (citing *USTA v. FCC*, 359 F.3d 554, 586 (D.C.Cir.2004) ("If (as appears) [entrance facilities] exist exclusively for the convenience of the CLECs, it seems anomalous that CLECs do not themselves provide them . . . .")).

[4] Although it may appear obvious, it bears express mention that, in writing this paragraph, the FCC did not use "interconnection" as a verb, describing the act of interconnecting with the ILEC network. As used in this paragraph, "interconnection" is an adjective, describing a noun (a certain type of facility) and thereby creating a new noun, an "interconnection facility," as something different and distinct from an "entrance facility." So, when the FCC says "access to these facilities" in the final sentence, we are confident that the FCC is referring to these "*interconnection* facilities" as opposed to those "entrance facilities" from which it has just drawn a distinction.

TRRO, 20 FCC Rcd. 2533, 2005 WL 289015, ¶ 140 (footnotes omitted).

[5] Michigan Bell continued to provide *interconnection* with its network at regulated (TELRIC) rates, as required by the statute

Bell notified the CLECs that it would be changing the "interconnection agreements" to reflect this new pricing scheme.

The CLECs, none too pleased with this impending price increase, responded by complaining to the MPSC, arguing that (regardless of the other paragraphs in the *TRRO*) paragraph 140 dictates that the CLECs are still entitled to use the entrance facilities at TELRIC rates for purposes of interconnection with the ILEC network. The MPSC agreed and ordered Michigan Bell to continue to provide entrance facilities at TELRIC rates. The parties refer to this as the "September Order."

Michigan Bell appealed to the district court, which agreed with Michigan Bell (i.e., disagreed with the MPSC's interpretation of the *TRRO*) and reversed the September Order, explaining:

> Th[is] [c]ourt agrees with [ ] Michigan [Bell] and concludes that the September Order[,] which pertains to this issue[,] does not comply with the rules that were adopted by the FCC pursuant to Section 251. It is not reasonable to interpret an explanatory comment, such as the one found in ¶ 140 of the *TRRO*, in a manner that undermines the plain meaning of the rule. The meaning of ¶ 140 must be interpreted in light of the FCC rule, which provides that entrance facilities need not be provided by incumbent carriers to

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and regulations, and nothing in the record suggests otherwise. Michigan Bell simply understood the *TRRO* to mean that an "entrance facility" is different from an "interconnection facility," such that, so long as it provides an "interconnection facility" at TELRIC rates, it can also offer an "entrance facility" (i.e., a different apparatus) at competitive rates, should it choose to do so.

> competing carriers on an unbundled basis. The *TRRO* conveys the finding by the FCC that entrance facilities should be offered competitively. A review of the ruling by the MPSC reveals that the September Order does not comply with this directive, and, accordingly, must be set aside.

Mich. Bell Tel. Co. v. Lark, No. 06-11982, 2007 WL 2868633, at *7 (E.D.Mich.2007).

Both the CLECs and the MPSC commissioners appealed the decision to this court, raising one issue for review. In addition, the FCC and Verizon have submitted briefs as *amicus curiae*.

II.

"When a district court's decision on summary judgment is the result of a review of a state administrative body's ruling, *de novo* review requires that the proper standard of review of the underlying state administrative ruling be applied." *Quick Commc'ns, Inc. v. Mich. Bell Tel. Co.*, 515 F.3d 581, 584 (6th Cir.2008). That is, we review de novo the question of whether the MPSC's order violated the Telecommunications Act, but we may overturn the MPSC's findings of fact and state law only if those findings were arbitrary and capricious. *Id.* Because the present case involves no findings of fact or determinations of state law, review in this case is entirely *de novo*.[6]

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[6] The dissent reviews the present case through the prism of *Auer* deference, through which a federal agency's interpretation of its own ambiguous regulation—even an interpretation presented in an amicus brief—is "controlling unless plainly erroneous or inconsistent with the regulation." *Auer v. Robbins*, 519 U.S. 452, 461, 117 S.Ct. 905, 137 L.Ed.2d 79 (1997) (quotation marks and citations omitted); *Coeur Alaska, Inc. v. Se. Alaska*

Cons.Council, 557 U.S.—, 129 S.Ct. 2458, 2470, 174 L.Ed.2d 193 (2009). The Supreme Court has since added two additional limitations: (1) a "near equivalence of the statute and regulation belies the [applicability of] Auer deference," *Gonzales v. Oregon*, 546 U.S. 243, 257, 126 S.Ct. 904, 163 L.Ed.2d 748 (2006); and (2) an agency cannot "under the guise of interpreting a regulation . . . create de facto a new regulation," *Christensen v. Harris County*, 529 U.S. 576, 588, 120 S.Ct. 1655, 146 L.Ed.2d 621 (2000); *see also Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 525, 114 S.Ct. 2381, 129 L.Ed.2d 405 (1994) (Thomas, J., dissenting); *Rosales-Garcia v. Holland*, 322 F.3d 386, 403 n. 22 (6th Cir.2003) (en banc). And, the Seventh Circuit has expressed some skepticism about the applicability of Auer deference to *amicus* briefs at the circuit court level, explaining:

> It is odd to think of agencies as making law by means of statements made in briefs, since agency briefs, at least below the Supreme Court level, normally are not reviewed by the members of the agency itself; and it is odd to think of Congress delegating lawmaking power to unreviewed staff decisions.

Keys v. Barnhart, 347 F.3d 990, 993-94 (7th Cir.2003) (citations omitted).

The dissent relies on the FCC's amicus brief to this court (submitted upon our request), in which the FCC offers an *interpretation* of the *TRRO*, which is itself an "interpretive rule" and not a true "regulation." *See A.D. Transp. Express, Inc. v. United States*, 290 F.3d 761, 768 (6th Cir.2002) ("An interpretative rule is a rule that clarifies or explains an existing law or regulation."; "[I]nterpretative rules fall within an exception to the [Administrative Procedures] Act and do not require notice and comment."). For these reasons alone, one might legitimately question the applicability of Auer deference in this appeal. *See Keys*, 347 F.3d at 993-94; *Coeur*, 129 S.Ct. at 2479 (Scalia, J., concurring) ("*Auer*, however, stands only for the principle that we defer to an agency's interpretation of *its own ambiguous regulation*." (emphasis in original)); *Boose v. TriCounty* Metro. Transp. Dist., 587 F.3d 997, 1005 (9th Cir.2009) ("We will not, under the guise of deference, engage in an end-run around notice-and-comment rulemaking.").

The key statutory provisions in this case involve "interconnection" and specify that "each incumbent local exchange carrier [i.e., ILEC] has the following duties:"

(2) Interconnection—The duty to provide, for the facilities and equipment of any requesting telecommunications carrier [i.e., CLEC], interconnection with the local exchange carrier's [i.e., ILEC's] network—

> (A) for the transmission and routing of telephone exchange service and exchange access;
>
> (B) at any technically feasible point within the carrier's network;
>
> (C) that is at least equal in quality to that provided by the local exchange carrier to itself or to any subsidiary, affiliate, or any other party to which the carrier provides interconnection; and
>
> (D) on rates, terms, and conditions that are just, reasonable, and nondiscriminatory, in accordance with the terms and conditions of the agreement and the requirements of this section and § 252.[7]

But, as will be addressed in the body of this opinion, even ignoring these questions of *Auer's* applicability, we find Auer deference unavailing in this appeal because the FCC's proffered interpretation is so plainly erroneous or inconsistent with the regulation, *see Auer*, 519 U.S. at 461, 117 S.Ct. 905, that we can only conclude that the FCC has attempted to create a new *de facto* regulation under the guise of interpreting the regulation, *see Christensen*, 529 U.S. at 588, 120 S.Ct. 1655. We therefore decline the dissent's invitation to apply *Auer* deference to *amici* FCC's position in this appeal.

[7] The pertinent provision of § 252 is the "pricing standards" provision, which states:

> (3) Unbundled access—The duty to provide, to any requesting telecommunications carrier for the provision of a telecommunications service, nondiscriminatory access to network elements on an unbundled basis at any technically feasible point on rates, terms, and conditions that are just, reasonable, and nondiscriminatory in accordance with the terms and conditions of the agreement and the requirements of this section and § 252 of this title.[8] An incumbent local exchange carrier shall provide such unbundled network elements in a manner that allows requesting carriers to combine such elements in order to provide such telecommunications service.

47 U.S.C. § 251(c). Thus, § 251(c)(2) requires the ILEC "to provide . . . interconnection with [its] network" to the CLEC (i.e., "for the [CLEC's] facilities and equipment"), whereas § 251(c)(3) requires the ILEC "to provide . . . any requesting [CLEC with] nondiscriminatory access to [i.e., use of] [its] network elements on an unbundled basis." But the statute further specifies:

> Interconnection and network element charges-Determinations by a State commission of the just and reasonable rate for the interconnection of facilities and equipment for purposes of § 251(c)(2), and the just and reasonable rate for [use of or access to the ILEC's] network elements for purposes of § 251(c)(3) shall be based on the cost (determined without reference to a rate-of-return or other rate-based proceeding) of providing the interconnection or network element (whichever is applicable) and nondiscriminatory, and may include a reasonable profit.

47 U.S.C. § 252(d) (statutory citation form altered). This was the origin of, and now means, TELRIC rates.

[8] See the foregoing footnote.

> In determining what network elements should be made available for purposes of subsection (c)(3) of this section, the [FCC] shall consider, at a minimum, whether . . . the [ILEC's] failure to provide access to such network elements *would impair the ability* of the [CLEC] to provide the services that it seeks to offer.

47 U.S.C. § 251(d)(2)(B) (emphasis added). This is the basis for the "impairment analysis."

The FCC has promulgated implementing regulations, at least two of which are pertinent here, the first being its "interconnection" regulation, which tracks 47 U.S.C. § 251(c)(2) (quoted above):

> An incumbent LEC shall provide, for the facilities and equipment of any requesting telecommunications carrier, interconnection with the incumbent LEC's network:
>
> (1) For . . . telephone exchange traffic . . .
>
> (2) At any technically feasible point within the [ILEC]'s network . . .
>
> (3) That is at a level of quality [used by the ILEC itself] . . .
>
> (4) On terms and conditions that are just . . . .

47 C.F.R. § 51.305. The FCC's other pertinent regulation—its counterpart to its "interconnection facility" requirement—is its rule that ILECs are *not obligated* to provide "entrance facilities":

> Entrance facilities. An incumbent LEC [i.e., ILEC] is not obligated to provide a requesting carrier [i.e., CLEC] with unbundled access to dedicated transport that does not connect a pair of incumbent LEC wire centers [i.e., an 'entrance facility'].

47 C.F.R. § 51.319(e)(2)(i). Recall that "[b]undling is about lease pricing," and "[t]o provide a network element 'on an unbundled basis' is to lease the element . . . to a requesting carrier at a stated price [i.e., TELRIC rates] specific to that element.'" *Verizon Commc'ns, Inc. v. FCC*, 535 U.S. 467, 531, 122 S.Ct. 1646, 152 L.Ed.2d 701 (2002). So, this provision could be rewritten as: an ILEC is not obligated to provide entrance facilities at TELRIC rates. Or, stated in positive terms: an ILEC can charge competitive rates for the use of its entrance facilities. The resulting inference is that the ILEC is not obligated to provide an entrance facility at all if it is inconvenient (or unprofitable) to do so. *See, e.g., USTA II*, 359 F.3d at 586 ("If (as appears) [entrance facilities] exist exclusively for the convenience of the CLECs, it seems anomalous that CLECs do not themselves provide them . . . .").

All of this brings us to the *TRRO*: what it says and what it means. In the part of the *TRRO* that addressed entrance facilities (and its analysis thereof), the FCC stated:

D. Entrance Facilities

136. In the *Local Competition Order*, the [FCC] defined dedicated transport as:

> incumbent LEC transmission facilities dedicated to a particular customer or carrier that provide telecommunications between wire centers owned by incumbent LECs or requesting telecommunications carriers, or between switches owned by incumbent LECs or requesting telecommunications carriers.

The [FCC] reaffirmed this definition, which encompassed entrance facilities (the transmission facilities that connect competitive LEC networks with incumbent LEC networks), in the *UNE Remand Order*. In the Triennial *Review Order*, we revised the definition of dedicated transport to exclude entrance facilities. We determined that entrance facilities 'exist outside the incumbent LEC's local network' and should therefore—given section 251's focus on competition within the local network-be excluded from the definition of dedicated transport. We also limited the definition of dedicated transport to 'those transmission facilities connecting incumbent LEC switches and wire centers within a LATA.' Reviewing the *Triennial Review Order*, the *USTA II* court indicated that our exclusion of entrance facilities from the definition of dedicated transport was at odds with the definition of 'network element' found in section 153(29) of the Act. Specifically, the court found that we erred in excluding these facilities from the definition of dedicated transport for purposes of implementing the section 251 unbundling obligation. The court noted, moreover, that '[i]f entrance facilities are correctly classified as 'network elements,' an analysis of impairment would presumably follow.'

137. The *USTA II* court did not reject our conclusion that incumbent LECs need not unbundle entrance facilities, only the analysis through which we reached that conclusion. In response to the court's remand, we reinstate the *Local Competition Order* definition of dedicated transport to the extent that it included entrance facilities, but we find that requesting carriers are not impaired without unbundled access to entrance facilities.

138. As the court suggested, we now conduct an impairment analysis with respect to entrance facilities and find that the economic characteristics of entrance facilities that we discussed in the *Triennial Review Order* support a national finding of non-impairment. Specifically, entrance facilities are less costly to build, are more widely available from alternative providers, and have greater revenue potential than dedicated transport between incumbent LEC central offices. As we noted in the *Triennial Review Order*, entrance facilities are used to transport traffic to a switch and often represent the point of greatest aggregation of traffic in a competitive LEC's network. Because of this aggregation potential, entrance facilities are more likely than dedicated transport between incumbent LEC offices to carry enough traffic to justify self-deployment by a competitive LEC. Moreover, competitive LECs have a unique degree of control over the cost of entrance facilities, in contrast to other types of dedicated transport, because they can choose the location of their own switches. For example, they can choose to locate their switches close to other competitors' switches, maximizing the ability to share costs and aggregate traffic, or close to transmission facilities deployed by other competitors, increasing the possibility of finding an alternative wholesale supply. In addition, they often can locate their switches close to the incumbent LEC's central office, minimizing the length and cost of entrance facilities.

139. The record in this proceeding also demonstrates that competitive LECs are increasingly relying on competitively provided entrance facilities. BellSouth notes, for example, that between

October 2003 and September 2004, 10 percent to 20 percent of the entrance facilities it had provided to competitive LECs were replaced by facilities obtained from other sources. Verizon states that between early 2003 and mid-2004, it migrated more than 32,000 entrance facility circuits to non-Verizon facilities. No commenters in this proceeding have disputed this evidence, which indicates that wholesale alternatives to entrance facilities provided by incumbent LECs are widely available. And it appears that incumbent LECs and competitors alike continue to agree that entrance facilities are more competitively available than other types of dedicated transport.

140. We note in addition that our finding of non-impairment with respect to entrance facilities does not alter the right of competitive LECs to obtain interconnection facilities pursuant to section 251(c)(2) for the transmission and routing of telephone exchange service and exchange access service. Thus, competitive LECs will have access to these [interconnection] facilities at cost-based rates to the extent that they require them to interconnect with the incumbent LEC's network.

141. The evidence described above convinces us that competitive LECs are not impaired without access to entrance facilities. We also conclude that it would be inappropriate to apply the same impairment test to entrance facilities that we have adopted for other types of dedicated transport. As we have explained, entrance facilities are characterized by unique operational and economic characteristics that justify separate treatment: they are less costly to build, are more

> widely available from alternative providers, and have greater revenue potential than dedicated transport between incumbent LEC central offices. For these reasons, we do not apply our test for other types of dedicated transport to entrance facilities.

TRRO, 20 FCC Rcd. 2533, 2005 WL 289015, ¶¶ 136-141 (footnotes omitted).

In one sense, the question in this appeal concerns this passage from the *TRRO*: what does it say and what does it mean? And the parties' disagreement as to the meaning is central to the present dispute. So, let us begin by restating it, as clearly and succinctly as we can, and then proceed to what it means. Based on our plain reading, we find the most plausible "translation" to be:

> 136. *In our last order, we drew two conclusions from a single premise:*
>
> *Premise: Entrance facilities are not even a part of (i.e., not 'within') the ILEC's network. Therefore:*
>
> *First Conclusion: Entrance facilities do not need to be unbundled; and*
>
> *Second Conclusion: We do not even need to conduct an impairment analysis on entrance facilities.*
>
> *Alas, when the USTA II court considered this proposition, it rejected our premise and our second conclusion.*
>
> 137. *But the USTA II court did not reject our first conclusion, and we now reach that same conclusion again, albeit for a different reason.*
>
> 138. *There is nothing monopolistic about entrance facilities. If you are a CLEC and you don't*

like the rates the ILEC is charging for use of its entrance facility, then build your own (or lease it from another CLEC that has built its own).

139. *Other CLECs are certainly doing that (i.e., building their own).*

140. *And, rest assured, if you build your own entrance facility, the ILEC must still let you hook it up to its network (i.e., use its "interconnection facility") at wholesale rates.*

141. *Therefore, entrance facilities need not be provided at TELRIC rates.*

So, the question becomes: does this mean what it says? The appellants contend that it does not. But, to find a different meaning, it is necessary to complicate this discussion considerably. That is, the appellants-the FCC, the MPSC Commissioners, and the CLECs—complicate this considerably. Before explaining their position, however, we think a simple analogy may be helpful.

Suppose you lived next to a public park that had no electrical hook-up of its own. And suppose that the village elders decided that, rather than installing an electrical hookup in the park, they would allow park-goers to hook up to your electricity at your house (and because they compensated you enough to cover the added electricity usage plus a tidy profit, you eagerly agreed). Thereafter, when park-goers arrived at the park needing electricity, you allowed them to plug into an electrical outlet in your garage. This outlet is the "interconnection facility."

But, after a few days of having park-goers trample across your yard and enter your garage to plug into the electrical outlet on the wall inside the garage, you decide to buy one of those big orange extension cords, plug it into the outlet in your garage, and run it across your yard and into the park. This makes access to the electricity closer to (and hence more convenient for) the park-goers, and they are no longer trampling your yard or entering your garage. And note, because park-goers can still plug into the outlet in your garage if they want to (i.e., they need not plug into the big orange extension cord if they don't want to), the big orange extension cord is an "entrance facility" and the outlet in your garage remains the "interconnection facility." Even if *all* the park-goers are plugging into the big orange extension cord, the cord is still an entrance facility. The interconnection facility remains the outlet in the garage so long as the park-goers *could* plug in there if they wanted to.

As more park-goers arrive, you might put out a second big orange extension cord (i.e., a second "entrance facility"). And suppose that, at this point, all the park-goers are happily plugged into the big orange extension cords. Now suppose that a couple more park-goers arrive with their own big orange extension cords ("entrance facilities"), wanting to hook up to your electricity (as is their right). So, you get one of those surge protectors with six or eight plug-ins, plug it into the outlet in the garage, and plug your two big orange extension cords, as well as the two new park-goers' extension cords, into this surge protector. The big orange extension cord would still be the entrance facility, but the outlet in the surge protector would now be the "interconnection facility." By forcing the park-goers to plug into the surge protector (rather than the wall outlet), you have moved the "interconnection facility." (And here is a critical aside: if you forced the park-goers to plug in to the big orange extension cord—and forbade them from plugging into the wall outlet (or the surge protector)—the big orange extension cord would become the "interconnection facility." But, to ease the analogy, let's just assume you allowed them to plug into the surge protector.[9])

Now, some time later, you need a big orange extension cord for some other purpose (let's say, Christmas lights), but the park-goers are using your extension cords. So, you tell the park-goers that you are either going to take the extension cords back or charge for their use, so that you can buy yourself a new one. But the park-goers complain to the village that they were promised electricity and now you won't give it. The village elders think it over and decide that you are right: the electricity they promised did not include free use of your big orange extension cords, so they say:

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[9] Of course, this aside is the very aside that confuses this whole situation in the present case—the FCC, MPSC, CLECs, and dissent argue (and two courts have agreed) that an "entrance facility" is an "interconnection facility" just because a CLEC can, could, or would use it to interconnect to the ILEC network. That is, they would argue that a big orange extension cord is an "interconnection facility" because the park-goers could or would use it to interconnect with the electrical outlet in the garage. But all of that misses the point, which is not whether the park-goers "can" use it to interconnect, but whether they "must." If you, as the homeowner, had said that they may plug into the surge protector, then the big orange extension cord is just an "entrance facility." But, if you had said they must plug into the big orange extension cord, then the big orange extension cord becomes the "interconnection facility" and, consequently, the park-goers may plug into it for free, under your agreement with the village to provide them with electricity. So it goes with the ILECs and CLECs—only when the ILEC says that the CLEC *must* connect at the entrance facility would that entrance facility become an interconnection facility (and, consequently, require TELRIC rates). All of this is beside the point, however, because nothing in the record suggests that Michigan Bell has told the CLECs that they *must* connect at a purported entrance facility.

> 138. There is nothing special about big orange extension cords. If you park-goers don't like the rate that the homeowner is going to charge you to use her extension cords (i.e., 'entrance facilities'), then bring your own (or lease one from another park-goer who has brought his or her own, if you can get a better deal).
>
> 139. Other park-goers are certainly doing that (i.e., bringing their own extension cords).
>
> 140. And, rest assured, if you bring your own big orange extension cord (i.e., 'entrance facility'), the homeowner must still let you plug it into her surge protector (i.e., her 'interconnection facility') at no cost, just as you were doing before.
>
> 141. Therefore, the homeowner need not provide big orange extension cords (i.e., 'entrance facilities').

That all seems simple enough.

And it appears just as simple when we apply this analogy to the facts of our case. Michigan Bell offers each CLEC both an interconnection facility and an entrance facility. So long as Michigan Bell offers an interconnection facility at TELRIC rates (and in compliance with 47 C.F.R. § 51.305), it may charge competitive rates for the use of its entrance facilities. Correspondingly, the CLEC may connect directly to the interconnection facility (at TELRIC rates), connect to Michigan Bell's entrance facility (at Michigan Bell's competitive rate), or connect to a third party's entrance facility (at the third party's rate).

But the MPSC Commissioners, the CLECs, the dissent, and the two Circuit Courts to have considered this all see it another way. They explain that entrance facilities are used for two purposes: (1) to carry communications among CLEC customers (i.e., backhauling); and (2) to interconnect the CLEC to the ILEC network. And, relying on this—otherwise unmentioned[10]—premise, they argue that ¶¶ 137,

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[10] The dissent contends that "backhauling" is not only mentioned, but that certain footnotes in the *TRRO*, ¶ 138 n. 389 and ¶ 141 n. 396, "draw that precise distinction" between backhauling and interconnection. Dis. Op. at ¶ 14. This is an overstatement of the *TRRO* and a misapprehension of the *TRO* as it is relied upon in those footnotes. First, the footnotes, which state in their entireties:

> ¶ 138, n389. [*TRO*, 18 FCC Rcd. 16978] at 17204-05, para. 367. The record contains evidence that competitive LECs are able to obtain entrance facilities from third-party providers. *See* NuVox Comments, Exh. A, Declaration of Keith Coker (NuVox Coker Decl.) at para. 3 ("[W]here available, NuVox utilizes third-party providers for backhaul from NuVox collocation arrangements to NuVox switches.")
>
> ¶ 141 n. 396. *See Triennial Review Order*, 18 FCC Rcd at 17204, para. 367 ("[T]he economics of dedicated facilities used for backhaul between networks are sufficiently different from transport within an incumbent LEC's network that our analysis must adequately reflect this distinction.") We thus reject commenters' suggestions that entrance facilities should be subject to the same test that applies to dedicated transport between incumbent LEC facilities. *See* AT & T Comments at 50-52; Loop-Transport Coalition Comments at 87; ATX, Bayring, et al. Reply at 48; McLeod Reply at 37.
>
> *TRRO*, 20 FCC Rcd. 2533, 2005 WL 289015 (Feb. 4.2005) (emphasis added).

The first thing to note is that these two, seemingly incidental, references to backhauling—within the context of six paragraphs and 23 footnotes—are hardly the paragons of "precise distinction" the dissent suggests. The second thing to note is that the FCC's reference to backhauling in the *TRO* ¶ 367 was not in support of a separate-use theory, but rather, was in support of the separate-facilities scheme we have explained throughout

138, and 141 say that the ILEC can charge competitive rates for the first use (i.e., backhauling), but ¶ 140 says that the ILEC must charge TELRIC rates for the other use (i.e., interconnection with the ILEC network). So, to complete our analogy, suppose a park-goer had taken the homeowner's big orange extension cord, strung it over a tree branch, and connected a light to the dangling end (resulting in a light dangling from the tree branch, via the big orange extension cord). Under this separate—use theory, the homeowner could charge the park-goer to use the extension cord for the purpose of holding the light off the ground, but not for conveying the electricity to that light.[11]

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this opinion. Specifically, the FCC used this distinction to support its position (since re-versed) that entrance facilities are not even part of the ILEC's network, and therefore would not require any impairment analysis at all. *See TRO* ¶ 366 n. 1116 ("Our determination here effectively eliminates 'entrance facilities' as [unbundled network elements] and, therefore, moots the [FCC's pending notice of proposed rule making] insofar as it proposes limitations on obtaining entrance facilities as UNEs.") (overruled by *USTA II*, 359 F.3d 554).

[11] At this point, as we are about to abandon this big-orange-extension-cord analogy, we invite you to return momentarily to the foregoing paragraph, in which we restated *TRRO* ¶¶ 138-141 in terms of this analogy, and attempt to reconcile this separate-use theory with the statement in those paragraphs (138-141). It cannot be done. Similarly, the backhauling separate—use theory simply cannot be reconciled with the plain language of *TRRO* ¶¶ 138-141.

We should also, at this point, pause to address the dissent's two corollaries to this hypothetical: its "meet-point" and its "collocation" examples. The first is incorrect and the second is inapposite. The dissent says that "[a]n incumbent's portion of a meet-point facility, it turns out, is merely one manifestation of an entrance facility," Dis. Op. at ¶ 8, but that is simply untrue.

This separate-use theory requires several assumptions, none of which is easily defended. First, it requires us to assume that the FCC used two separate terms—"entrance facility" and "interconnection facility"—to describe the same exact wire, without any explanation why.[12]

An ILEC's portion of a meet-point facility—as described by the dissent and the regulations—is an "interconnection facility," whereas the CLEC's portion of the meet-point is an "entrance facility." The meet-point example fits perfectly within our framework. (For further explanation, see the next footnote.) The dissent also cites the "collocation" example. This is one of virtually limitless examples of an analogy being an imperfect fit, as would be the case with any analogy. As for the question of whether an interconnection facility is distinct and different from an entrance facility, however, this collocation example is wholly irrelevant.

[12] This assumption is the crux of the dissent's principal argument—that interconnection facilities and entrance facilities are really one and the same because "[e]ntrance facilities come within the ordinary meaning of a 'technically feasible method of obtaining interconnection.'" Dis. Op. at ¶ 7 (quoting 47 C.F.R. § 51.321(a)). That is, the dissent "reasons" that because ILECs must "provide . . . any technically feasible method of obtaining interconnection" at cost-based rates, *see* 47 C.F.R. § 51.321(a), and because entrance facilities are a technically feasible method of obtaining interconnection, the ILECs must therefore provide entrance facilities at cost-based rates.

We reject this argument for at least three reasons. First, this directly contradicts 47 C.F.R. § 51.319(e)(2)(i), which says that an ILEC is not obligated to provide entrance facilities at cost-based rates. Second, at least in our view, entrance facilities are not actually a "technically feasible means of obtaining interconnection" because they do not connect the CLEC with the ILEC network directly; entrance facilities, when used, connect the CLEC with the interconnection facility (i.e., ILEC Interconnection Facility Entrance Facility CLEC). And finally, even if entrance facilities were a technically feasible method of interconnection, 47 C.F.R. § 51.321(a) does not require the ILEC to provide an

Second, it requires us to assume that the FCC used "entrance facility" to refer to a particular use of that wire (i.e., for purposes of transporting data among CLEC customers (backhauling), rather than between the CLEC and ILEC),[15] even though the FCC has

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entrance facility rather than some other ("any" other) technically feasible means. The dissent's logic is flawed. Suppose, for example, a public school system was obligated to provide school children with a feasible means of transportation to and from school. A limousine is a feasible means of transportation-indeed, some children, at least on television, take limousines to and from school. So, by the dissent's logic, the school system would be obligated to provide limousines because limousines are a feasible means of transportation.

[15] The dissent eagerly accepts this assumption, suggesting that the *TRO* and the *TRRO* should be read in conjunction and arguing that the *TRO* establishes the separate use distinction between backhauling and interconnection. Dis. Op. at ¶ 15.

"Why [else]," the dissent exclaims, "would the FCC clutter its unbundling analysis [in the TRO] by stressing the distinction between backhauling and interconnection?" Dis. Op. at ¶ 15 (citing TRO ¶ 365). If we treat this as a real inquiry, and not a rhetorical argument, the answer is plain. The FCC took an entirely different approach in the TRO—an approach that was later rejected by USTA II and reconsidered in the TRRO—in which it held that entrance facilities (no matter their use) were outside of the ILEC's network, so no impairment analysis was even necessary.

In the paragraph cited by the dissent (*TRO* ¶ 365), the FCC drew a distinction between interconnection facilities and entrance facilities, albeit without using those terms. In fact, the FCC did not use the phrase "interconnection facility" anywhere in the *TRO*; that is a phrase new to the *TRRO*. In the *TRO*, the FCC referred to what it now calls "interconnection facilities" as "interconnection points" (see, e.g., *TRO* ¶¶ 7, 350 n. 1058, 367 n. 1120), designated certain types of these points (e.g., single point of interconnection (SPOI), minimum point of entry (MPOE)), and grouped these points by description as "the facilities that incumbent LECs explicitly must make available for section

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251(c)(2) interconnection" (*TRO* ¶ 365). The FCC did not use the phrase "interconnection *points*" anywhere in the *TRRO*; it used the phrase "interconnection *facilities*." *See, e.g.*, *TRRO* ¶ 140. On the other side of that distinction, the FCC—in the *TRO*—described "entrance facilities" as "transmission facilities connecting incumbent LEC networks to competitive LEC networks for the purpose of backhauling traffic." *TRO* ¶ 365. So, the distinction between backhauling and interconnection is, again, not between uses but between *facilities*. The paragraph states, in pertinent part:

> [I]n order to access UNEs, including transmission between incumbent LEC switches or wire centers, while providing their own switching and other equipment, competitive LECs require a transmission link [i.e., an entrance facility] from the UNEs on the incumbent LEC network [i.e., interconnection facility] to their own equipment located elsewhere. Competitive LECs use these transmission connections between incumbent LEC networks and their own networks [i.e., entrance facilities] both for interconnection and to backhaul traffic. Unlike the facilities that incumbent LECs explicitly must make available for section 251(c)(2) interconnection [i.e., interconnection facilities], we find that the Act does not require incumbent LECs to unbundle transmission facilities connecting incumbent LEC networks to competitive LEC networks for the purpose of backhauling traffic [i.e., entrance facilities].

TRO ¶ 365 (footnote omitted). This same paragraph would read as follows if it were translated into the terms of the *TRRO* (i.e., using the phrases "entrance facility" and "interconnection facility"):

> In order to access the ILEC network, CLECs need a transmission link from the ILEC's interconnection facility to their own equipment located elsewhere, and this is called an "entrance facility." CLECs use these entrance facilities both for interconnection with the interconnection facility and to backhaul traffic. Unlike "interconnection facilities," which ILECs must make available for interconnection, the Act does not require ILECs to provide these "entrance facilities."

So, returning to the dissent's question: "Why . . . would the FCC clutter its unbundling analysis by stressing the distinction between backhauling and interconnection?" Dis. Op. at ¶ 15 never defined entrance facility that way. *See TRRO* ¶ 136 ("entrance facilities [are] the transmission facilities that connect competitive LEC networks with incumbent LEC networks"); 47 C.F.R. § 51.319(e)(2)(i) ("Entrance facilities [are] . . . dedicated transport that does not connect a pair of incumbent LEC wire centers").

Third, it requires us to assume that the FCC used the term "interconnection facility" to refer to a particular use of that wire (i.e., for purposes of transporting data between the CLEC and ILEC, rather than among CLEC customers), even though neither the FCC nor any court has ever defined interconnection that way. *See Local Competition Order*, 11 FCC Rcd. 15499, 1996 WL 452885, ¶ 176 (Aug. 8, 1996) ("the term 'interconnection' under section 251(c)(2) refers only to the physical linking of two networks"); *AT & T Corp. v. FCC*, 317 F.3d 227, 234 (D.C.Cir. 2003) ("to 'interconnect' and to exchange traffic have distinct meanings"; interconnect "refers only to 'facilities and equipment,' not to the provision of any service"); *Competitive Telecom. Ass'n v. FCC*, 117 F.3d 1068, 1071-72 (8th Cir.1997) ("Congress intended 'for the transmission and routing of telephone exchange service and exchange access' only to describe what the interconnection, the physical link, would be used for . . . . By its own terms, this reference [to interconnection] is to a physical link, between the

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(citing *TRO* ¶ 365). The answer is clear: to describe and differentiate two types of *facilities* for which it had not yet established names. And, "Why would [the FCC] underscore the incumbents' continuing obligation to provide interconnection facilities?" Dis. Op. at ¶ 15. Because interconnection facilities and entrance facilities are different things.

equipment of the carrier seeking interconnection and the LEC's network.").

Finally, it requires us to assume that when Congress used the phrase "provide . . . interconnection with the [ILEC]'s network," 47 U.S.C. § 251(c) (emphasis added), Congress actually meant that the ILEC is obligated to "lease a physical facility (or wire)" *to* the CLEC rather than merely "make a plug—in available" *for* connection with the CLEC's facilities and equipment, even though this is an unnatural reading of the phrase, with no support in the statute.

In *Illinois Bell Telephone Co. v. Box*, 526 F.3d 1069, 1071-72 (7th Cir.2008), the Seventh Circuit considered this issue and held that "[w]hat the FCC said in ¶ 140 is that ILECs must allow use of entrance facilities for interconnection at 'cost-based rates.'" But, the Seventh Circuit began its analysis by assuming the very question to be decided, stating:

> In the [TRRO], the FCC concluded that CLECs do not need entrance facilities *for backhauling* and should build their own equipment *for handling CLEC-to-CLEC traffic*. ILECs need not provide unbundled network elements to CLECs that can serve customers without 'impairment' through their own network elements. No one contests the FCC's conclusion in this litigation.

Id. at 1071 (citation omitted; emphasis added). But, these two[14] qualifiers—"for backhauling" and "for handling CLEC-to-CLEC traffic"-are nowhere to be found in the text of the *TRRO* passage at issue here. The Seventh Circuit added these, without explanation or justification.

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[14] Obviously, this is actually just one qualifier, inasmuch as "for handling CLEC-to-CLEC traffic" is the definition of "backhauling," and why the Seventh Circuit used two separate labels is unclear—other than as a show of solidarity with the FCC and its claim that it used two separate labels for the same wire.

If we remove those qualifiers from this passage, we have an interpretation of ¶ 140 that is both drastically different from the Seventh Circuit's and true to the plain language of the *TRRO*:

> In the TRRO, the FCC concluded that CLECs do not need [ILECprovided] entrance facilities ~~for backhauling~~ and should build their own [entrance-facility] equipment ~~for handling CLEC to CLEC traffic~~. ILECs need not provide unbundled network elements to CLECs that can serve customers without 'impairment' through their own network elements. No one contests the FCC's conclusion in this litigation.

Thus, we cannot join the Seventh Circuit's interpretation of the *TRRO*.

Using its qualifier-filled interpretation of ¶ 140 of the *TRRO*, the Seventh Circuit declared that this is the proper reading of the *TRRO* because this is what the FCC said in the *TRRO*. But the Seventh Circuit's "reasoning" is entirely circular. It said:

> AT & T protests that [by making entrance facilities available at TELRIC rates to the CLECs for interconnection, the state commission] nullifies the FCC's order. What's the point of specifying

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"entrance facility" and "interconnection facility." In any event, we note them separately here to emphasize that neither term is actually included in the *TRRO* passage at issue here, nor is either term clearly connected to this passage when used elsewhere in the *TRRO*.

> that CLECs cannot demand access to entrance facilities as unbundled network elements, AT & T inquires, if state commissions can turn around and require the same access at the same price anyway? The answer . . . is that CLECs do not enjoy the 'same' access to entrance facilities under the state commission's decision as they did before the FCC's order. Until then CLECs could use entrance facilities for both interconnection and backhauling. Under the state's order, CLECs use entrance facilities exclusively for interconnection, *just as the FCC said in ¶ 140.*

Id. (emphasis added). But once we omit the unexplained and unjustified qualifiers, and thereby remove the artificial distinction that they create (between backhauling and interconnection), it becomes clear that the act of making entrance facilities available at TELRIC rates for interconnection (but not backhauling) is insupportable inasmuch as its sole support (i.e., *TRRO* ¶ 140) actually says no such thing. Consequently, we reject both the premise and the conclusion in *Illinois Bell*.

In *Southwestern Bell Telephone, L.P. v. Missouri Public Service Commission*, 530 F.3d 676, 683-84 (8th Cir.2008), the Eighth Circuit considered this issue and reached the same conclusion as the Seventh Circuit. After acknowledging the clear statement in the *TRRO* that CLECs are not impaired without access to entrance facilities, the Eighth Circuit turned right around and asserted that this finding "does not, however, alter the right of CLECs to obtain interconnection facilities pursuant to § 251(c)(2) for transmission and routing of telephone exchange service and exchange access service, i.e., CLEC to ILEC and ILEC to CLEC traffic." *Id.* Without further explanation or justification (other than a "see" cite to *Box*, 526 F.3d at 1071-72), the court asserted:

> The FCC determined [that] when a CLEC uses entrance facilities to carry traffic to and from its own end users, i.e., backhauling or CLEC to CLEC, the CLEC is not entitled to obtain entrance facilities as UNEs at TELRIC rates. If a CLEC needs entrance facilities to interconnect with an ILEC's network, it has the right to obtain such facilities from the ILEC. Thus, CLECs must be provided access at TELRIC rates if necessary to interconnect with the ILEC's network.

Id. But, as with *Box*, this conclusion is only true if the (assumed) premise is true, and it is not—the FCC made no backhauling distinction in the *TRRO* and the FCC has not said that CLECs have a right to entrance facilities for some purposes but not others. The FCC has said that ILECs have no obligation to provide entrance facilities at TELRIC rates. *See* 47 C.F.R. § 51.319(e)(2)(i).

We do not find these two cases persuasive. The most plausible reading of the plain language of the *TRRO* is that the ILEC must allow the CLEC to connect its network to the ILEC's network, and may not charge the CLEC more than TELRIC rates for this connection. If the ILEC requires the CLEC to connect at some point other than directly into its network, then the link (or "bridge" if the word "bridge" provides a better image) between the ILEC's designated connection point and the ILEC's network is what *TRRO* ¶ 140 refers to as an "interconnection facility," and the ILEC may charge only TELRIC rates for the use of that (or any) interconnection facility.

Any facility (link, "bridge," etc.) outside of the ILEC's designated connection point (i.e., the link that connects the CLEC to the ILEC's designated connection point, and from there to the ILEC network via the ILEC's interconnection facility), is *not* itself an "interconnection facility"; it is an "entrance facility." Obviously, the CLEC would ultimately be using the entrance facility to connect its network with the ILEC's network (through the designated point, via the interconnection facility), but that is wholly immaterial. The material distinction is not between interconnection and some other use (e.g., backhauling); the material distinction is between the ILEC's side of the designated connection point (i.e., the "interconnection facility") and the CLEC's side of the designated connection point (i.e., the "entrance facility").

Moreover, the ILEC most assuredly has *no obligation to provide any entrance facility* and the CLEC has no obligation to use the ILEC's entrance facility (the CLEC can connect directly to the interconnection facility, rent someone else's entrance facility, or build its own entrance facility). Of course, if the ILEC chooses to provide an entrance facility, it must provide it *in addition to* the interconnection facility, *not instead* of the interconnection facility (as that would effectively change the designated connection point and transform the purported "entrance facility" into an "interconnection facility"). And, if the CLEC chooses to use the ILEC's entrance facility, it must pay the rates determined by the ILEC, in competition with other providers.

As we understand the situation in the case before us, the ILEC (Michigan Bell) offers its CLECs an interconnection facility at TELRIC rates and entrance facilities at competitive rates, which is in perfect accordance with the plain language of the *TRRO*. The MPSC ordered Michigan Bell to offer the CLECs the use of its entrance facilities at TELRIC rates, and based this order on its mistaken belief that *TRRO* It 140 requires Michigan Bell to treat its entrance facilities as interconnection facilities any time the CLECs ultimately use them for interconnection. The district court rejected the MPSC's reading of the *TRRO*, and we agree with the district court's view.

III.

For all of the foregoing reasons, we AFFIRM the judgment of the district court.

SUTTON, *Circuit Judge*, dissenting.

The majority admirably pieces together the statutory, regulatory and technical components of this complicated case. Together, the majority concludes, they show that the duty of the incumbent telecommunication provider, Michigan Bell, "to provide . . . interconnection with [its] network" to competitors at cost-based rates, 47 U.S.C. § 251(c)(2), requires only that Michigan Bell provide competitors with a place to plug into its local telephone network and that "entrance facilities" fall outside of this interconnection obligation. That may be a reasonable interpretation. So too, however, is the FCC's competing interpretation, one premised on an interpretation of its own regulations and one that we must respect as a result. See Auer v. Robbins, 519 U.S. 452, 461, 117 S.Ct. 905, 137 L.Ed.2d 79 (1997). I accordingly respectfully dissent.

Prior to the Telecommunications Act of 1996, Pub.L. No. 104-104, 110 Stat. 56, incumbent local telephone companies, such as Michigan Bell, enjoyed a natural monopoly. The high fixed costs of recreating a local telephone network, including running wires to each home and business in a community, together with the low marginal cost of operating a pre-existing network gave incumbents "an almost insurmountable competitive advantage." *Verizon Commc'ns, Inc. v. FCC*, 535 U.S. 467, 490, 122 S.Ct. 1646, 152 L.Ed.2d 701 (2001). To combat these monopolies, the 1996 Act mandates that incumbents share their network with competitors at cost-based rates. *See id.* at 489, 122 S.Ct. 1646; *AT & T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 371, 119 S.Ct. 721, 142 L.Ed.2d 835 (1999).

As part of this sharing obligation, incumbents must lease certain elements of their network to competitors on an "unbundled"—a la carte-basis and must do so at cost-based rates. 47 U.S.C. § 251(c)(3), (d)(2). That allows a competitor to connect its network with other phone networks, to provide enhanced services to its customers or to expand its network so it can reach a broader potential customer base. *See id.* § 153(29); *Triennial Review Order*, 18 F.C.C.R. 16978 ¶ 59 (2003); 47 C.F.R. § 51.319(a). The upshot of this duty is that, if a competitor wishes to offer phone service to everyone in a given community without incurring the upfront costs of running its own wire to each potential customer, the Act and implementing regulations facilitate the entrant's efforts by requiring the incumbent to offer these services on unbundled terms and at cost-based rates.

The Act imposes a related, but narrower, sharing obligation, one that also must be provided at cost-based rates. Incumbents must "provide . . . interconnection with [their] network" to competitors so customers on one network can seamlessly call customers on the other network. 47 U.S.C. § 251 (c)(2); *see id.* § 251(d)(1); 47 C.F.R. § 51.5 (defining interconnection as the "linking of two networks for the mutual exchange of traffic"); FCC Br. at 4. In the absence of this obligation, no rational consumer would switch from the large incumbent to the competing entrant, at least without a steep discount. Who wants a local phone service that connects customers to just a handful of other individuals in the community? *See Verizon Commc'ns*, 535 U.S. at 490, 122 S.Ct. 1646. By requiring cost-based rates for this service, the Act ensures that incumbents do not charge competition-dampening rates for interconnection, a not insignificant risk given that entrants need interconnection more than incumbents do.

Which brings me to "entrance facilities," the part of the network of the incumbent, Michigan Bell, at issue here. Entrance facilities physically link telecommunications networks together, see Triennial Review Remand Order (*TRRO*), 20 F.C.C.R. 2533 ¶¶ 136-39 (2005), and competitors use an incumbent's entrance facilities for two purposes: interconnection and backhauling. *See Triennial Review Order* ¶ 365. When used for interconnection, entrance facilities route traffic between one of the competitor's customers and one of the incumbent's customers. When used for backhauling, entrance facilities route traffic between two of the competitor's customers, likely because the competitor leases some elements of the incumbent's network, rather than between a customer of the competitor and a customer of the incumbent. *See id.* ¶¶ 365, 367.

In deciding what incumbents may charge for the use of their entrance facilities, the FCC interprets its regulations to draw a distinction. On one side of the line, incumbents must lease their entrance facilities to competitors at cost-based rates when they use the facilities for interconnection. On the other side, incumbents may charge market-based rates, or not lease the facilities at all, when competitors use the facilities for backhauling. *See* FCC Br. at 15-17, 20. Everyone (at least everyone involved in this case) agrees that the FCC correctly concluded that incumbents may charge market-based rates for backhauling. What divides the parties is whether the FCC correctly concluded that incumbents cannot do the same for interconnection. In answering this question, we must keep in mind that Congress charged the FCC with administering § 251, *see* 47 U.S.C. § 251 (d)(1), and the FCC wrote the regulations at issue, all of which means that the FCC's interpretation binds us unless it flouts the regulations' text. *See Auer*, 519 U.S. at 461, 117 S.Ct. 905.

The line drawn by the FCC permissibly interprets its own regulation. In elaborating on § 251(c)(2)'s duty to "provide . . . interconnection," the FCC's regulation says that incumbents must provide "any technically feasible method of obtaining interconnection" at cost-based rates. 47 C.F.R. § 51.321(a). Entrance facilities come within the ordinary meaning of a "technically feasible method of obtaining interconnection." They are "designed for the very purpose of linking two carriers' networks." *Ill. Bell Tel. Co. v. Box*, 526 F.3d 1069, 1072 (7th Cir.2008). And that is how competitors use them—to bridge the gap between their network and an interconnection point within the incumbent's network so that the two networks can mutually exchange traffic. *See U.S. Telecom Ass'n v. FCC*, 359 F.3d 554, 586 (D.C.Cir.2004).

In providing illustrative examples of an incumbent's interconnection duties in § 51.321, the FCC confirms that the regulation uses the phrase "method of obtaining interconnection" in its ordinary sense-one that applies to entrance facilities. One example says that incumbents upon request must interconnect with competitors through meet point facilities, *see* 47 C.F.R. § 51.321(b)(2), which requires the incumbent and competitor to build transmission facilities from their respective networks to a designated meet point and to link the two transmission facilities together at that point "for the mutual exchange of traffic," *Local Competition Order*, 11 F.C.C.R. 15499 ¶ 553 (1996). An incumbent's portion of a meet point facility, it turns out, is merely one manifestation of an entrance facility, as entrance facilities are "the transmission facilities that connect competitive LEC networks with incumbent LEC networks." *See TRRO* ¶ 136. Another example-dealing with collocation, which is installing and maintaining equipment for use solely by the competitor at an incumbent's physical facilities, *see* 47 C.F.R. § 51.5—also shows that an incumbent's duty to provide methods of obtaining interconnection covers facilities that aid in bridging the gap between two networks. *See* 47 U.S.C. § 251(c)(6) (mandating that incumbents allow physical or virtual "collocation of equipment necessary for interconnection"); 47 C.F.R. § 51.321(b)(1).

To put all of this in context, it might help to return to the majority's extension-cord analogy. The meet point example is akin to saying that the homeowner sometimes must provide a park-goer with an extension cord, at a cost-based price, that links the outlet in the garage with the park-goer's extension cord, rather than forcing the park-goer to run an extension cord all the way from the park to the garage or forcing the park-goer to pay the homeowner market-based rates for the use of one of its cords. The collocation obligation is akin to saying that the homeowner sometimes must let park-goers store an extension cord on a reel in the garage and access the garage when they want to extend the cord from the garage to the park. As these examples show, an incumbent's interconnection duty encompasses more than providing competitors with an outlet to plug into.

The *Triennial Review Remand Order* does not undermine the FCC's position. The *TRRO* represents the FCC's fourth attempt to promulgate valid unbundling regulations, *see Covad Commc'ns Co. v. FCC*, 450 F.3d 528, 531 (D.C.Cir.2006), and it aims to satisfy the D.C. Circuit's concerns in setting aside the FCC's previous unbundling regulations, *see TRRO* ¶¶ 1-4, 13, 19-20. Nearly a quarter of the order clarifies the FCC's overarching unbundling analysis and not one paragraph discusses how the FCC analyzes interconnection obligations. *See id.* ¶¶ 20-65.

The one section that mentions entrance facilities confirms the *TRRO's* focus on unbundling, not interconnection. The section analyzes whether competitors would be "impair[ed]" without unbundled access to entrance facilities under § 251(c)(3), and it concludes that they would not be. *See TRRO* ¶¶ 136-41; *see also* 47 U.S.C. § 251(d)(2). Yet, as the FCC points out, an impairment analysis has no role to play under § 251(c)(2), see 47 U.S.C. § 251(d)(2); FCC Br. at 16, and the FCC has never, to my knowledge, considered impairment when analyzing an incumbent's interconnection obligations. *See Ill. Bell*, 526 F.3d at 1072 (noting that whether an incumbent can charge market-based rates for interconnection "is not related to the scope of an [incumbent's] obligations under § 251(c)(3) to furnish unbundled network elements"). It would be surprising, then, if the *TRRO* exempted entrance facilities from the pre-existing obligations of

47 C.F.R. § 51.321(a) through a novel analysis without comment.

The *TRRO's* sole mention of interconnection in the context of entrance facilities instead sounds a cautionary note: No one should read the FCC's categorical unbundling analysis under § 251(c)(3) as affecting incumbents' interconnection duties under § 251(c)(2). *See TRRO* ¶ 140 (stating "our finding of non-impairment with respect to entrance facilities does not alter the right of competitive LECs to obtain interconnection facilities pursuant to section 251 (c)(2)"). This cautionary note makes perfect sense if, as the FCC and both courts of appeals to address this issue have concluded, entrance facilities used for interconnection fall within § 251(c)(2)'s interconnection obligation. *See Ill. Bell*, 526 F.3d at 1071-72 ("What the FCC said in ¶ 140 is that [incumbents] must allow use of entrance facilities for interconnection at 'cost-based rates'."); *Sw. Bell Tel., L.P. v. Mo. Pub. Serv. Comm'n*, 530 F.3d 676, 684 (8th Cir.2008).

The regulations promulgated by the *TRRO*, moreover, discuss only unbundling obligations. They say that "in accordance with section 251(c)(3)"—the provision imposing the unbundling requirement—an incumbent "is not obligated to provide a requesting carrier with *unbundled access* " to entrance facilities. 47 C.F.R. § 51.319(e) (emphasis added); *see also TRRO*, 20 F.C.C.R. at 2682. This speaks only to an incumbent's unbundling obligation, not its narrower, independent duty to "provide . . . interconnection" under § 251(c)(2). Michigan Bell disagrees, claiming the regulation "unequivocal[ly]" states that incumbents have no obligation to provide entrance facilities, period. Michigan Bell Br. at 23. But this turns the phrase "with unbundled access" into a useless appendage. *See Safeco Ins. Co. of Am. v. Burr*, 551 U.S. 47, 59-60, 127 S.Ct. 2201, 167 L.Ed.2d 1045 (2007) (noting general rule that courts should give effect to all words in a provision).

Michigan Bell reads the *TRRO* differently. The *TRRO*, it says, draws no distinction between the functions of an entrance facility (backhauling versus interconnection), but instead draws a distinction between two distinct and mutually exclusive types of facilities (entrance versus interconnection). The text of ¶¶ 136-41, it is true, does not distinguish between backhauling and interconnection. But the footnotes to those paragraphs draw that precise distinction. See *TRRO* ¶¶ 138 n. 389, 141 n. 396. And even if the FCC had not drawn this functional line, that would not eliminate ambiguity about the point; the silence would create ambiguity, particularly since the FCC consistently has drawn functional lines when implementing the 1996 Act. *See Triennial Review Order* ¶¶ 365-67; *Local Competition Order* ¶ 553. Either way, Auer deference applies to the FCC's position that those paragraphs draw a functional line that exempts incumbents only from the obligation to lease their entrance facilities at cost-based rates when competitors use those facilities for backhauling, as opposed to interconnection.

Michigan Bell's competing interpretation also fits awkwardly with the *TRRO* and its predecessor, the *Triennial Review Order*. Why, if that interpretation is correct, would the FCC clutter its unbundling analysis by stressing the distinction between backhauling and interconnection? *See Triennial Review Order* ¶ 365. And why would it underscore the incumbents' continuing obligation to provide interconnection facilities? *See id.*; *TRRO* ¶ 140. These points of emphasis make little sense if entrance facilities never function as § 251(c)(2) interconnection facilities.

To support its mutual exclusivity theory, the majority notes that incumbents may choose whether a facility counts as an entrance facility or an interconnection facility. If the incumbent requires that competitors interconnect at that facility, then it is an interconnection facility. But if the incumbent provides a facility that bridges the gap between the incumbent-designated interconnection point and the competitor's network, then it counts as an entrance facility. This premise, however, does not square with § 251(c)(2), which requires incumbents to "provide . . . interconnection" "at any technically feasible point within [its] network." 47 U.S.C. § 251(c)(2) (emphasis added); *see also Local Competition Order* ¶ 209 (stating that § 251(c)(2) allows competitors "to select the points in an incumbent['s] . . . network at which they wish to deliver traffic"). And in the absence of this premise, I see no workable way to distinguish between these two supposedly distinct and mutually exclusive types of facilities.

One more point. While the majority's principal objection to this analysis is that the regulation is plain as day and thus leaves no room for administrative deference, it also suggests two reasons for ignoring *Auer* deference altogether. *First*, it cites a Seventh Circuit case, which suggests that agency amicus briefs (like the one filed here) should get *Auer* deference only at the Supreme Court, not at the court of appeals. Until a case reaches the Supreme Court, goes the view, agency briefs represent "unreviewed staff decisions," and Congress could not have meant to delegate "the power to make law to fill gaps in" the law to low-level staff. *Keys v. Barnhart*, 347 F.3d 990, 993-94 (7th Cir.2003).

A deference doctrine that turns on whether a brief was filed in the United States Supreme Court or a court of appeals has little to commend it. An "inferior" appellate court, U.S. Const. art. III § 1, has just as many reasons, if not more, to learn the agency's interpretation of one of its regulations in the course of resolving a dispute between two private parties before it issues a decision rather than after. This case is a perfectly good example. The regulations are intricate and complex, and as a result we called for the views of the FCC in order to understand how the agency construed its regulations and to make sure we were not missing something in the process. The Seventh Circuit may or may not be right that, when a court of appeals invites an agency to take a position in a given case, it can expect nothing more than "unreviewed staff decisions." As for myself, I doubt it, and if I am wrong that suggests a management problem, not a proper view of how agencies should operate. It seems likely that agencies take their amicus briefs—particularly those filed *at the request* of a court of appeals—at least as seriously as their more frequent opinion letters, which also receive *Auer* deference, *see Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555, 563-64, 100 S.Ct. 790, 63 L.Ed.2d 22 (1980). As agencies must well appreciate, moreover, lower courts reap the same benefits as the Supreme Court from an agency's "fair and considered judgment," *Auer*, 419 U.S. at 462, 95 S.Ct. 584, including the advantage of the agency's "unique expertise and policymaking prerogatives," *Martin v. Occupational Safety & Health Review Com'n*, 499 U.S. 144, 151, 111 S.Ct. 1171, 113 L.Ed.2d 117 (1991). In any event, the Supreme Court has strongly hinted that *Auer* deference does not turn on whether an agency's position was prepared by its staff or its head. *See Ford Motor Credit Co.*, 444 U.S. at 566 n. 9, 100 S.Ct. 790. There is, in short, no reason why an agency brief—particularly one filed at the request of a court—becomes less authoritative because it is filed with a court based in Cincinnati, Ohio rather than one based in Washington, D.C.

Second, the majority suggests that the *TRRO* does not deserve *Auer* deference because it is an interpretive rule, not a legislative one. I disagree with the majority's characterization of the *TRRO* and its suggestion that interpretive rules do not deserve *Auer* deference. The FCC had a formal notice-and-comment period before issuing the *TRRO*, and the *TRRO* concludes by adopting seven pages of amendments to the Code of Federal Regulations. *See TRRO* ¶¶ 18-19, 239-251, App'x A, App'x B. The *TRRO* in point of fact promulgates the version of 47 C.F.R. § 51.319(e)(2)(i) that the majority quotes. *See TRRO* at 2677, 2682; Maj. Op. at 376-77. All of this confirms that the *TRRO* is a legislative rule. *See Lincoln v. Vigil*, 508 U.S. 182, 195-196, 113 S.Ct. 2024, 124 L.Ed.2d 101 (1993); *St. Francis Health Care Ctr. v. Shalala*, 205 F.3d 937, 949 (6th Cir.2000) ("[I]f by its action the agency intends to create new law . . . , the rule is properly considered to be a legislative rule.").

Perhaps the majority means that ¶¶ 136-40 of the *TRRO* do not deserve deference because those paragraphs are part of the "concise general statement" of the *TRRO's* "basis and purpose," 5 U.S.C. § 553(c), not amendments to the federal code. *See* Maj. Op. at 375 n. 6 ("[T]he *TRRO* . . . is . . . not a true 'regulation.'"). I am unaware of any court reading such a line into *Auer*. No one has done so, I believe, because "[c]ourts and Congress treat the terms 'regulation' and 'rule' as interchangeable," *Nat'l Treasury Employees Union v. Weise*, 100 F.3d 157, 160 (D.C. Cir.1996), and "concise general statements" are part of the rule, *see* 5 U.S.C. § 553(c); *Lincoln*, 508 U.S. at 195-96, 113 S.Ct. 2024. Justice Scalia's concurrence in *Coeur Alaska* is not to the contrary. *See Coeur Alaska, Inc. v. Se. Alaska Conservation Coucil*, — U.S. —, 129 S.Ct. 2458, 2479, 174 L.Ed.2d 193 (noting courts defer under *Auer* only "to an agency's interpretation of *its own ambiguous regulation*."). Justice Scalia was distinguishing between regulations and statutes, not between sections of a legislative rule. *See id*.

But whether the *TRRO* is an interpretive or legislative rule is beside the point. We generally defer to an agency's interpretation of its own rules because it "make[s] little sense" to impose our interpretation on the agency when it remains free to rewrite the rule (largely) however it wants. *Auer*, 519 U.S. at 463, 117 S.Ct. 905. That rationale applies with extra force to interpretive rules: An agency could amend its interpretive rule and wipe a court's interpretation off the board without even the delay of notice-and-comment rulemaking.

In the final analysis, the FCC's interpretation reasonably respects the words of its regulations and Auer requires us to respect that interpretation. The majority seeing it differently, I respectfully dissent.

APPENDIX B

UNITED STATES COURT OF APPEALS, NINTH CIRCUIT

Nos. 08-15568, 08-15716.

PACIFIC BELL TELEPHONE COMPANY,
dba AT&T CALIFORNIA,
Plaintiff-Appellant,

v.

CALIFORNIA PUBLIC UTILITIES COMMISSION; MICHAEL R. PEEVEY; DIAN M. GRUENEICH; JOHN BOHN; RACHELLE CHONG; TIMOTHY ALAN SIMON,
Defendants-Appellees.

PACIFIC BELL TELEPHONE COMPANY,
dba AT&T CALIFORNIA,
Plaintiff-Appellant,

v.

CALIFORNIA PUBLIC UTILITIES COMMISSION; MICHAEL R. PEEVEY; DIAN M. GRUENEICH; JOHN BOHN; RACHELLE CHONG; TIMOTHY ALAN SIMON,
Defendants.

and CBEYOND COMMUNICATIONS, LLC,
Defendant-Intervenor-Appellant.

Argued and Submitted Oct. 6, 2009.
Filed March 4, 2010.

Before MARY M. SCHROEDER, A. WALLACE TASHIMA and CARLOS T. BEA, Circuit Judges.

BEA, Circuit Judge:

This case involves the balance the Telecommunications Act of 1996 ("the Act") strikes between providing newer competitors access to previously monopolistic telecommunications markets, on the one hand, and encouraging and protecting infrastructure investments of older, incumbent telecommunications providers on the other. We must interpret two provisions of the Act that impose requirements on older, incumbent local exchange carriers ("incumbent LECs")-like appellant AT & T-to lease certain components of their existing infrastructure to rival newer, competitive carriers ("competitive LECs")-like intervenor Cbeyond.

First, we must determine whether 47 U.S.C. § 251(c)(2) requires an incumbent LEC to lease its "entrance facilities" (wires that connect rival telephone systems) to a competitive LEC at regulated rates when the competitor wishes to use the "entrance facility" to permit its own customers to reach customers of the incumbent LEC.

Second, we must determine whether 47 C.F.R. § 51.319(e)(2)(ii)(B) (the "DS1 Cap Rule"), which limits to ten the number of low-capacity DS1 telephone lines an incumbent LEC must lease to a competitive LEC at regulated (low) rates along certain routes, is a limitation which also applies to any route, regardless whether the competitive LEC is "impaired" as to the alternative to such low-capacity lines: the competitive LEC's own higher-capacity DS3 lines.

Properly to understand the terms used and the regulatory area into which we are about, some background would help.

BACKGROUND

A. The Telecommunications Act of 1996

Prior to 1996, local telephone service generally was provided by a local monopolist who offered services at prices regulated and imposed by a variety of governmental agencies. Such monopolist providers are commonly referred to as "incumbent local exchange carriers" or "incumbent LECs." Congress enacted the Act to deregulate the telecommunications market. *See generally Verizon Comms. Inc. v. FCC*, 535 U.S. 467, 475-76, 122 S.Ct. 1646, 152 L.Ed.2d 701 (2002). But, to facilitate the entry of new participants into these local markets, the Act imposes on incumbent LECs two duties relevant in this case.

Interconnection Duty at Regulated Rates.

First, the Act imposes a duty on incumbent LECs to permit "interconnection." Pursuant to 47 U.S.C. § 251(c)(2),[1] incumbent LECs must allow the competitive LEC to link its network to that of the incumbent LEC, so that customers of the competitive LEC may place calls to customers of the incumbent LEC.

Without the ability to link its network to that of the incumbent LEC, the competitive LEC would have little prospect of selling its telephone services, to say nothing of competing for the customers of the incumbent LEC. A local telephone service is of little use if it cannot connect to other local telephone users.

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[1] 47 U.S.C. § 251(c)(2) provides that each incumbent LEC has "the duty to provide, for the facilities and equipment of any requesting telecommunications carrier, interconnection with the local exchange carrier's network."

Lease of Network Parts at Regulated Rates.

Second, the Act imposes a duty that incumbent LECs "unbundle"[2] parts of their network. Each such part of the incumbent LEC's network is a "network element". Pursuant to 47 U.S.C. § 251(c)(3),[3] incumbent LECs must permit competitive LECs to lease, at regulated cost-based rates, parts of the incumbent's network, such as telephone wires, call exchanges, and routing systems. This provision promotes competition by allowing a competitive LEC to enter the telephone service market without having first to overcome capital barriers to entry, *i.e.*, without having to construct, at high cost, every component necessary to operate a network. *See Ill. Bell Tel. Co. v. Box*, 548

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[2] "Unbundling" is the process of breaking apart something into smaller parts. An example is taking a bundled computer system and unbundling it into its individual pieces such as the PC unit, monitor, keyboard, and mouse, and then selling each of these items individually. In the context of this case, "unbundling" is the term used to describe the access provided by incumbent LECs so that other service providers (*i.e.*, competitive LECs) can buy or lease portions of the incumbent LECs' network elements, such as interconnection loops, to serve subscribers.

[3] 47 U.S.C. § 251(c)(3) provides that incumbent LEC's have: "The duty to provide, to any requesting telecommunications carrier for the provision of a telecommunications service, nondiscriminatory access to network elements on an unbundled basis at any technically feasible point on rates, terms, and conditions that are just, reasonable, and nondiscriminatory in accordance with the terms and conditions of the agreement [negotiated in good faith by the incumbent LEC and competitive LEC pursuant to § 251(c)(1)] and the requirements of this section and section 252 of this title. An incumbent local exchange carrier shall provide such unbundled network elements in a manner that allows requesting carriers to combine such elements in order to provide such telecommunications service."

F.3d 607, 609-10 (7th Cir.2008) ("*Box II*"). For example, a competitive LEC might enter a market by providing residential telephone service in two far-flung neighborhoods. Rather than having to lay its own wire to connect the two neighborhoods, the competitive LEC can, under § 251(c)(3), piggyback on the incumbent LEC's preexisting network at regulated, cost-based rates. In this way, a competitive LEC may more easily and less expensively begin to establish its market presence.

However, before an incumbent LEC is obligated to lease network elements on an unbundled basis, the Federal Communications Commission ("FCC") must find that a refusal to deal would "impair" competition. Section 251(d)(2) requires the FCC to determine which network elements incumbent LECs must offer to a competitive LEC on an unbundled basis. 47 U.S.C. § 251(d)(2).

Once the FCC determines that a particular network element must be offered on an unbundled basis, a competitive LEC that wishes to lease the network element must negotiate with the incumbent LEC to determine price and other terms. 47 U.S.C. § 251(c)(1). If the negotiations come to an impasse or otherwise fail to produce and agreement, the parties must submit the dispute to binding arbitration.[4] The arbitrator's decision is subject to approval by the relevant state regulatory commission, usually the state public utilities commission. *Id.* If the parties have failed to agree on the lease price, the state regulatory commission may set a price that is "just and reasonable." *Id.* § 252(d)(1).

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[4] As the Seventh Circuit has noted, the "arbitration" is really the first stage in a regulatory proceeding, for it bears none of the traditional hallmarks of normal arbitration such as voluntary consent and finality. *See Ill. Bell Tel. Co. v. Box*, 526 F.3d 1069, 1070 (7th Cir.2008) ("*Box I*").

These "just and reasonable" rates must be based upon the Total Element Long Run Incremental Cost ("TELRIC") methodology. 47 C.F.R. § 51.505. The TELRIC methodology is based on what it cost the incumbent LEC to acquire the network elements; this historical cost method often results in prices that, under certain circumstances, can be highly favorable to the competitive LECs. *See Verizon Communications*, 535 U.S. at 489, 496-97, 122 S.Ct. 1646 (upholding 47 C.F.R. § 51.505); *Box II*, 548 F.3d at 609.

The FCC's attempts to implement the incumbent LEC's unbundling obligations have a long history. The first three published rules were invalidated by the courts, in part,[5] and it was not until the FCC issued the Triennial Review Remand Order in 2005 (the "TRRO"), Order on Remand, *In the Matter of Unbundled Access to Network Elements: Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 20 F.C.C.R. 2533 (Feb. 4, 2005), that the FCC's rules survived judicial review, *see Covad Comms. Co. v. FCC*, 450 F.3d 528 (D.C.Cir.2006). Two predecessor orders, the relevant parts of which were not invalidated by courts, are relevant to our analysis and are discussed in greater detail below: the 2003 Triennial Review Order (the "TRO"),[6] and the 1996 Local Competition Order (the "LCO").[7]

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[5] *See Covad Comms. Co. v. FCC*, 450 F.3d 528, 533-534 (D.C.Cir.2006) (describing history of invalidated FCC unbundling orders).

[6] Report and Order and Order on Remand and Further Notice of Proposed Rule-making, *Review of the Section 251 Obligations*

B. Procedural History

After the FCC issued the TRRO, AT & T-the incumbent LEC in California-sought to negotiate changes to its agreements with competitive LECs to bring their contracts into conformity with AT & T's now-changed obligations. After negotiations broke down, AT & T brought a consolidated arbitration proceeding before the California Public Utilities Commission ("CPUC"). CPUC issued a decision favoring the competitive LECs on several disputed issues, and AT & T filed an action in federal district court seeking to set aside four of CPUC's orders related to unbundling. Two of these orders are at issue on appeal:

1. *Entrance Facilities*—CPUC ordered AT & T to lease entrance facilities to competitor LECs at TELRIC rates for the purpose of interconnection. An entrance facility is a "dedicated transport" (a wire) that connects one LEC's "switch" (a computer that routes calls) to another LEC's switch. In other words, an entrance facility is the high capacity wire that links telephone networks. Entrance facilities may be used for two distinct purposes. First, a competitive LEC can use an entrance facility for interconnection-that is, to link the competitive LEC's network with that of the incumbent LEC so that the competitive LEC's customers may reach the incumbent LEC's customers. *See* TRRO ¶ 138-40; TRO ¶ 366-67.

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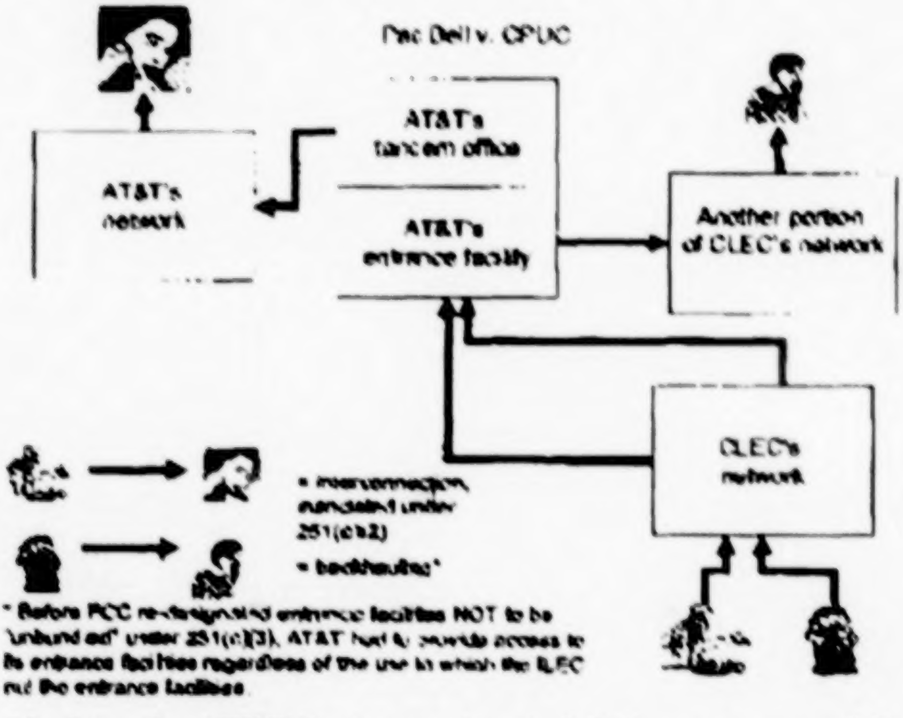
of Incumbent Local Exchange Carriers, 18 F.C.C.R. 16978 (2003), *vacated in part by United States Telecom Ass'n v. FCC*, 359 F.3d 554 (D.C.Cir.2004).

[7] First Report and Order, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 F.C.C.R. 15499 (1996) (subsequent history omitted).

Second, a competitive LEC can use an entrance facility for what the industry calls "backhauling." In the case of backhauling, the competitive LEC uses the entrance facility to permit its *own* customers to reach *one another* over the incumbent LECs network. *See id.*[8] The following diagram illustrates the difference between interconnection and backhauling:


Pac Bell v. CPUC
AT&T's tandem office
AT&T's entrance facility
AT&T's network
Another portion of CLEC's network
CLEC's network
= interconnection, mandated under 251(c)(2)
= backhauling*
* Before FCC re-designated entrance facilities NOT to be "unbundled" under 251(c)(3), AT&T had to provide access to its entrance facilities regardless of the use to which the CLEC put the entrance facilities.

Under the TRRO, incumbent LECs are not obligated to offer entrance facilities on an unbundled basis under 47 U.S.C. § 251(c)(3). AT & T and the competitive LECs disputed, however, whether § 251(c)(2) obligates incumbent LECs to lease their entrance facilities to competitive LECs at TELRIC rates for the purposes of "interconnection" (*i.e.*, for the purpose of allowing competitive LEC customers to place calls to incumbent LEC customers). CPUC concluded that § 251(c)(2) requires incumbent LECs to lease entrance facilities to competitive LECs at TELRIC rates for interconnection. On cross motions for summary judgment, the district court confirmed CPUC's arbitral order on this point, and AT & T timely appealed.

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[8] Incumbent LECs are capable of screening out calls that would be used for backhauling. A computer identifies the destination of the call, and, if the call is bound for a customer of the competitive LEC, the computer can screen out the call.

2. *DS1 Transport*—CPUC also ruled that the DS1 Cap Rule applies only on routes where competitive LECs are not "impaired"[9] as to DS3 transport circuits. A "transport circuit" is a wire that carries telecommunications signals along "routes" between switching centers (computers that direct calls to other locations). TRRO ¶ 67. Transport circuits come in two grades relevant here: DS1 (low capacity) and DS3 (high capacity). A DS3 line can carry twenty-four times as many calls as a DS1 line but is more expensive to buy and install than DS1 lines. TRRO ¶ 129 n. 361. All parties agree that the FCC's rules cap the number of DS1 circuits competitive LECs may lease from incumbent LECs on an unbundled basis along routes where competitive LECs are not "impaired" as to higher capacity DS3 lines. Once a competitive LEC has sufficient traffic to justify leasing ten or more DS1 lines, it is economical for the

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[9] According to FCC regulations, a competitive LEC's ability to provide service is " 'impaired' if, taking into consideration the availability of alternative elements outside the incumbent LEC's network, including elements self-provisioned by the requesting carrier or acquired as an alternative from a third-party supplier, lack of access to that element poses a barrier or barriers to entry, including operational and economic barriers, that are likely to make entry into a market by a reasonably efficient competitor uneconomic." 47 C.F.R. § 51.317(b).

competitive LEC to build, deploy, and install its own DS3 line. TRRO ¶¶ 71-73.

However, AT & T and the competitive LECs disputed whether this cap also applies to routes where the FCC had concluded that competitive LECs were "impaired" as to higher capacity DS3 lines. CPUC ruled in favor of the competitive LECs, and held that the cap did not apply along such "DS3-impaired" routes. The district court disagreed, concluding that, under the plain language of the FCC's rule, the DS1 Cap applies along all routes, and vacated the arbitral order on this point. Cbeyond filed a motion in the district court to join the action as an intervenor for the purpose of appeal.

ANALYSIS

This court reviews *de novo* claims of error in a district court's order determining whether an arbitrator's decision complies with FCC regulations. *Verizon Cal., Inc. v. Peevey*, 462 F.3d 1142, 1150 (9th Cir.2006). This court owes no deference to the arbitrator's decision. *Id.* The parties may not challenge the validity of any final order of the FCC, including FCC regulations, in this action. 28 U.S.C. § 2342.[10]

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[10] Under the Hobbs Act, this court lacks jurisdiction to rule on a collateral attack of an FCC order. 28 U.S.C. § 2342; *see also U.S. West Comms., Inc. v. Jennings*, 304 F.3d 950, 958 n. 2 (9th Cir.2002) ("Properly promulgated FCC regulations currently in effect must be presumed valid for the purposes of this appeal. The Hobbs Act, 28 U.S.C. § 2342, requires that all challenges to the validity of final orders of the FCC be brought by original petition in a court of appeals. The district court thus lacked jurisdiction to pass on the validity of the FCC regulations, and no question as to their validity can be before us in this appeal."); *see also GTE S., Inc. v. Morrison*, 199 F.3d 733, 742-43 (4th Cir.1999) (holding the court lacked jurisdiction to rule on the

A. Access to Entrance Facilities Under 47 U.S.C. § 251(c)(2).

AT & T contends the district court erred by affirming the CPUC's arbitral order permitting competitive LECs to lease entrance facilities from incumbent LECs under 47 U.S.C. § 251(c)(2), the interconnection provision. Both the Seventh and the Eighth circuits recently rejected AT & T's position, and have concluded that FCC regulations authorize state public utilities commissions to order incumbent LECs to lease entrance facilities to competitive LECs at regulated rates for the purpose of interconnection. *See Sw. Bell Tel., LP v. Mo. Pub. Serv. Comm'n*, 530 F.3d 676 (8th Cir.2008) ("*SWBT*"); *Ill. Bell Tel. Co. v. Box*, 526 F.3d 1069 (7th Cir.2008) ("*Box I*").[11] We agree with our sister circuits.

Section 251(c)(2) provides that "each incumbent local exchange carrier has the . . . duty to provide, for the facilities and equipment of any requesting telecommunications carrier, interconnection with the local exchange carrier's network." 47 U.S.C. § 251(c)(2). The FCC defines interconnection as "the linking of

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validity of FCC rules "including those relating to rule-making" on review of district court order affirming state public utility's arbitral decision relating to provisions of the Act).

[11] In *Box I*, the Seventh Circuit held that because entrance facilities were a "technologically feasible" means of handing off traffic between a competitive LEC and an incumbent LEC, an obligation to lease such facilities at TELRIC rates was within the scope of § 251(c)(2) and the implementing regulations. 526 F.3d at 1071-72. The Eighth Circuit reached the same conclusion in *SWBT*, 530 F.3d at 683-84. In *SWBT*, the Eighth Circuit stated: "If a [competitive] LEC needs entrance facilities to interconnect with an [incumbent] LEC's network, it has the right to obtain such facilities from the [incumbent] LEC." *Id.* at 684.

two networks for the mutual exchange of traffic." 47 C.F.R. § 51.5. In other words, interconnection provides a way for a competitive LEC's customers to reach AT & T's customers and vice versa. Section 251(c)(2)(B) specifies that incumbent LECs must offer competitive LECs such interconnection "at any technically feasible point within the [incumbent] carrier's network." 47 U.S.C. § 251(c)(2)(B). The FCC regulation also states that incumbent LECs must provide competitive LECs with "any technically feasible method of obtaining interconnection." 47 C.F.R. § 51.321(a).

The FCC calls entrance facilities "the transmission facilities that connect competitive LEC networks with incumbent LEC networks." TRRO ¶ 136. As the term "entrance" implies, entrance facilities provide a way for a competitive LEC's calls to enter AT & T's network and reach AT & T customers, a fact that AT & T concedes. For the competitive LECs to use the entrance facilities this way is interconnection.[12]

That AT & T's entrance facilities can be used for a purpose besides interconnection (*i.e.*, backhauling) does not change the result that 47 U.S.C. § 251(c)(2) mandates AT & T to provide competitive LECs access at regulated rates to its entrance facilities for interconnection. The parties disagree about the effect on this result of the FCC's finding in its TRRO that under a different subsection of the Act, § 251(c)(3),[13] competitive LECs are not impaired[14] in building entrance facilities and therefore that entrance facilities are not "unbundled network elements" that incumbent LECs like AT & T have a duty to provide competitive LECs *for any purpose*, including backhauling. TRRO ¶¶ 136-141.

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[12] AT & T seeks to distinguish the historical use of entrance facilities for interconnection by long distance service providers, which did not compete with AT & T, and the current use by competitive LECs, which do compete with AT & T. AT & T states that "entrance facilities in this case provides the same function" as entrance facilities did historically (*i.e.*, connecting networks), but competitive LECs can feasibly interconnect with AT & T at a different point in AT & T's network, whereas the long distance providers could not. This contention does not survive the plain language of § 251(c)(2)(B), which requires an incumbent LEC to provide interconnection "at *any* technically feasible point within [its] network." (Emphasis added.)

As an initial matter, under general principles of statutory interpretation, the specific duty found in 47 U.S.C. § 251(c)(2) of providing interconnection facilities prevails over the general duty of providing network elements at unbundled rates, found in § 251(c)(3) (regardless whether that general unbundling duty exists as to entrance facilities). *See NLRB v. A-Plus Roofing, Inc.*, 39 F.3d 1410, 1415 (9th Cir.1994) ("It is a well-settled canon of statutory interpretation that specific provisions prevail over general provisions.").

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[13] Section 251(c)(3) provides that incumbent LECs have "[t]he duty to provide, to any requesting telecommunications carrier for the provision of a telecommunications service, nondiscriminatory access to network elements on an unbundled basis at any technically feasible point on rates, terms, and conditions that are just, reasonable, and nondiscriminatory in accordance with the terms and conditions of the agreement and the requirements of this section and section 252 of this title. An incumbent local exchange carrier shall provide such unbundled network elements in a manner that allows requesting carriers to combine such elements in order to provide such telecommunications service."

[14] The Act tasks the FCC with deciding whether a particular network element, *i.e.*, "a facility or equipment used in the provision of a telecommunications service," 47 U.S.C. § 153(29), is one that incumbent LECs must lease to competitive LECs at regulated rates, i.e., the element is "unbundled" under 47 U.S.C. § 251(c)(3). 47 U.S.C. § 251(d). To make that determination, the FCC must consider, at a minimum, two factors: "whether (A) access to such network elements as are proprietary in nature is necessary; and (B) the failure to provide access to such network elements would impair the ability of the telecommunications carrier seeking access to provide the services that it seeks to offer." *Id.* The FCC thus makes an "impairment finding" as to that network element. *See Covad Comms.*, 450 F.3d at 534-45.

Moreover, as the district court found, the TRRO reinforces that the duties of incumbent LECs under 47 U.S.C. § 251(c)(2) and § 251(c)(3) are independent. The TRRO states that the FCC's finding that incumbent LECs need not lease entrance facilities as unbundled network elements under (c)(3) "does not alter the right of competitive LECs to obtain interconnection facilities pursuant to section 251(c)(2)." TRRO ¶ 140.

AT & T contends TRRO Paragraph 140 does not require incumbent LECs to offer entrance facilities at TELRIC rates because the TRRO uses the term "interconnection facilities" instead of "entrance facilities" when it refers to the right under 47 U.S.C. § 251(c)(2) that is not altered by the TRRO's determination that "entrance facilities" need not be unbundled under § 251(c)(3). First, although the FCC did not use the term "entrance facilities" in Paragraph 140, the paragraph appears in a section of the TRRO entitled "Entrance Facilities," which solely discusses the effect of the FCC's finding as to entrance facilities. Moreover, prior FCC rulings make clear that the interconnection obligation contained in § 251(c)(2) includes a duty to lease entrance facilities at TELRIC rates when such facilities will be used for the purposes of interconnection. The 1996 Local Competition Order ("LCO") broadly defined the interconnection obligation to include a duty to offer unbundled network elements at TELRIC rates:

> We conclude that, under sections 251(c)(2) *and* 251(c)(3), any requesting carrier may choose *any method of technically feasible interconnection* or access to unbundled elements at a particular point. Section 251(c)(2) imposes an interconnection duty at any technically feasible point; *it does not limit that duty* to a specific method of interconnection or *access to unbundled elements*.

LCO ¶ 549 (emphasis added); *see also* 47 C.F.R. § 51.321(a) (stating that incumbent LECs are required to offer "any technically feasible method of obtaining interconnection").

Though the LCO did not expressly state that entrance facilities were one of the "network elements" incumbent LECs were required to make available under 47 U.S.C. § 251(c)(2), the later Triennial Review Order ("TRO") expressly interpreted the LCO to impose this obligation. The TRO stated:

> In reaching [the determination that entrance facilities are not "network elements" subject to the unbundling obligation in § 25 1 (c)(3)] we note that, to the extent that requesting carriers need facilities in order to 'interconnect with the incumbent LEC's network,' section 251(c)(2) of the Act *expressly provides for this* and we do not alter the Commission's interpretation of this obligation.

TRO ¶ 365. The TRO elaborated:

> [C]ompetitive LECs often use transmission links including unbundled transport connecting incumbent LEC switches or wire centers in order

> to carry traffic to and from its end users. These links constitute the incumbent LEC's own transport network. However, in order to access UNEs [unbundled network elements], including transmission between incumbent LEC switches or wire centers, while providing their own switching and other equipment, competitive LECs require a transmission link from the UNEs on the incumbent LEC network to their own equipment located elsewhere. Competitive LECs use these transmission connections between incumbent LEC networks and their own networks both for interconnection and to backhaul traffic. Unlike the facilities that incumbent LECs explicitly must make available for section 251(c)(2) interconnection, we find that the Act does not require incumbent LECs to unbundle transmission facilities connecting incumbent LEC networks to competitive LEC networks for the purpose of backhauling traffic.

TRO ¶ 366. The TRO thus expressly interpreted the LCO to allow competitive LECs to lease entrance facilities or "transmission links" at TELRIC rates for the purpose of achieving interconnection. This interpretation of the LCO is reasonable and entitled to deference.[15] *Auer v. Robbins,* 519 U.S. 452, 461, 117 S.Ct. 905, 137 L.Ed.2d 79 (1997) (An agency's interpretation of its own regulation is "controlling unless plainly erroneous or inconsistent with the regulation.")).[16] Moreover, AT & T's contention that the TRO's interpretation of the LCO conflicts with the terms of 47 U.S.C. § 251(c)(2) is foreclosed because AT & T cannot challenge the validity of FCC orders in this proceeding. *See Jennings*, 304 F.3d at 958 n. 2.

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[15] Contrary to AT & T's assertion, this portion of the TRO was not vacated in *USTA II*, 359 F.3d 554. *USTA II* vacated only the TRO's conclusion that entrance facilities are categorically excluded from the definition of "network elements" under § 251(c)(3). *Id.* at 585. The court did not rule on the validity of the FCC's conclusion that, under § 251(c)(2), incumbent LECs are obligated to offer entrance facilities at TELRIC rates.

AT & T also contends CPUC's interpretation conflicts with the FCC's express findings that competitive LECs are not "impaired" as to entrance facilities. *See* TRRO ¶¶ 138, 139. But those FCC findings also expressly distinguished entrance facilities used for the purpose of interconnection and for backhauling. TRRO ¶¶ 138-140. In light of the different economic considerations associated with the use of entrance facilities for interconnection, on the one hand, and for backhaul, on the other, the FCC could reasonably conclude that different regulations were appropriate. Where a competitive LEC uses an interconnection facility for backhaul, only the competitive LEC benefits-both the originator and the recipient of the call are competitive LEC customers. But when the competitive LEC uses the entrance facility for interconnection, both competitor and incumbent benefit: the incumbent's customers can reach customers of the competitor, and vice versa. *See generally* LCO ¶ 162 ("In this situation . . . each gains value from the interconnection arrangement."); TRO ¶ 367 ("Our conclusion in this respect is buttressed by the fact that the economics of dedicated facilities used for back-haul between networks are sufficiently different from transport within an incumbent LEC's network that our analysis must adequately reflect this distinction."); *see also Box I*, 526 F.3d at 1071 ("What's the point of specifying that [competitive] LECs cannot demand access to entrance facilities as unbundled network elements, AT & T inquires, if state commissions can turn around and require the same access at the same price anyway? The answer . . . is that [competitive] LECs do not enjoy the 'same' access to entrance facilities under the state commission's decision as they did before the FCC's order. Until then, [competitive] LECs could use entrance facilities for both interconnection and backhauling.").

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[16] The specific statements in the TRO and the LCO that the obligation to provide facilities and equipment under § 251(c)(2) includes a duty to provide entrance facilities foreclose AT & T's interpretation of the term "interconnection facilities." AT & T relies on 47 C.F.R. § 51.5, which defines "interconnection" to exclude the "transport and termination of traffic." AT & T construes this language to exclude *any* duty under § 251(c)(2) to carry a competitive LEC's traffic. This conflicts with TRRO ¶ 140 itself, which explains that "interconnection facilities" are "for transmission and routing" of telephone calls. If the duty to provide "interconnection" did not include any duty to provide *any* transport of calls, then § 251(c)(2) would be meaningless because incumbents could physically link networks with the competitive LEC, but refuse to carry calls to the incumbent LEC's terminal customers, thus effectively locking the competitive LEC out of the market.

Accordingly, we agree with the district court and hold that, under 47 U.S.C. § 251(c)(2), incumbent LECs must lease entrance facilities at TELRIC rates to competitive LECs for the purpose of interconnection.

B. Unbundled Access to DS1 Circuits Under 47 U.S.C. § 251(c)(3).

In its cross-appeal, Cbeyond contends the district court erred in vacating the CPUC's order that required incumbent LECs to grant unbundled access to an unlimited number of DS1 transport circuits along routes on which competitive LECs are impaired as to DS3 transport circuits.[17] The district court concluded that the plain language of the governing regulation, 47 C.F.R. § 51.319(e)(2)(ii)(B) (the "DS1 Cap Rule"),[18] limits a competitive LEC to a maximum of ten DS1 circuits along any route regardless whether the competitive LEC is impaired as to DS3 lines. We agree. Under the plain language of the regulation, the DS1 Cap Rule applies to *all* routes where DS1 circuits are available on an unbundled basis.

On appeal, Cbeyond contends the district court's interpretation of the DS1 Cap Rule is contrary to the FCC's findings in the earlier TRRO. Cbeyond concedes, however, that the language of the DS1 Cap Rule-47 C.F.R. § 51.319(e)(2)(ii)(B)-unambiguously limits to ten the number of DS 1 circuits an incumbent LEC must offer at TELRIC rates on any route.

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[17] AT & T incorrectly contends Cbeyond waived this issue by failing to raise it in the district court. This issue is (1) a pure question of law; and (2) was fully briefed in the district court by the CPUC. Accordingly, the issue has not been raised for the first time on appeal and this court can reach the issue. Even if the issue was presented for the first time on appeal, the court could reach the question. *See K & N Eng., Inc. v. Bulat*, 510 F.3d 1079, 1081 n. 2 (9th Cir.2007) (the court may, in its discretion, reach issues raised for the first time on appeal if the record is fully developed, the question is a pure question of law, and no prejudice will result).

[18] The DS1 Cap Rule provides: "Cap on unbundled DS1 transport circuits. A requesting telecommunications carrier may obtain a maximum of ten unbundled DS1 dedicated transport circuits on each route where DS1 dedicated transport is available on an unbundled basis."

In general, the plain meaning of an administrative regulation controls. *Webb v. Smart Document Solutions, LLC*, 499 F.3d 1078, 1084 (9th Cir.2007). Plain meaning, however, is "not the end of the inquiry." *Id.* at 1086; *see also Safe Air for Everyone v. EPA*, 488 F.3d 1088, 1097 (9th Cir.2007). The plain language of a regulation does not control if "clearly expressed administrative intent is to the contrary or if such plain meaning would lead to absurd results." *Id.* (internal quotation marks and alterations omitted). "[T]he regulatory intent that overcomes plain language must be referenced in the published notices that accompanied the rulemaking process." *Id.* A rule leads to absurd results only if it would be "patently inconceivable" that the agency intended the result. *Id.* at 1098.

Here, there is no "clearly expressed administrative intent" in the published notices that accompanied the DS1 Cap Rule rulemaking process. Further, the DS1 Cap Rule as we read its plain text would not lead to absurd results. It is perfectly conceivable the FCC meant what it said when it limited the number of DS1 circuits that a competitive LEC can lease on routes where the competitive LEC is impaired as to a higher capacity DS3 circuit. Where a competitive LEC is so impaired, it will have access to an incumbent's DS3 circuits on an unbundled basis. Hence, it would be more economical for the competitive LEC to lease a single DS3 line from the incumbent LEC, rather than eleven or more DS1 lines at greater cost. TRRO ¶ 128 ("This is consistent with the pricing efficiencies of aggregating traffic. While a DS3 circuit is capable of carrying 28 uncompressed DS1 channels, the record reveals that it is efficient for a carrier to aggregate traffic at approximately 10 DS1s."). The FCC expressly found that once a competitive LEC could aggregate sufficient traffic, the DS3 rules should apply: "When a carrier aggregates sufficient traffic on DS1 facilities such that it effectively could use a DS3 facility, we find that our DS3 impairment conclusions should apply." *Id.*

It is hardly "patently inconceivable" that the FCC intended the DS1 cap to apply on all routes, even those where competitive LECs are impaired as to DS3 circuits. In such circumstance, the competitive LEC can obtain more economical DS3 circuits, and there is no reason why the FCC would have intended to permit competitive LECs to impose greater costs on incumbent LECs by allowing unlimited leases of DS1 circuits.

Cbeyond's contention that the DS1 Cap Rule conflicts with the terms of 47 U.S.C. § 251(c)(3) is foreclosed because Cbeyond cannot challenge the validity of the FCC orders in this proceeding. *See Jennings*, 304 F.3d at 958 n. 2.

Accordingly, we agree with the district court and hold that, under the plain language of the regulation, the DS1 Cap Rule limits to ten the number of DS1 lines an incumbent LEC must lease to a competitive LEC at TELRIC rates on all routes.

CONCLUSION

For the all of the foregoing reasons, we affirm the district court's order confirming in part and vacating in part the CPUC's arbitral order.

AFFIRMED.

APPENDIX C

UNITED STATES COURT OF APPEALS, EIGHTH CIRCUIT.

Nos. 06-3701, 06-3726, 06-3727.

SOUTHWESTERN BELL TELEPHONE, L.P., doing business as SBC MISSOURI,
Plaintiff-Appellee,

v.

MISSOURI PUBLIC SERVICE COMMISSION; JEFF DAVIS; CONNIE MURRAY; STEVE GAW; ROBERT M. CLAYTON III; LINWARD APPLING, in their official capacities as commissioners of the Missouri Public Service Commission and not as individuals,
Defendants,

BIG RIVER TELEPHONE COMPANY, LLC,
Defendant-Appellant,

BIRCH TELECOM OF MISSOURI, INC.; IONEX COMMUNICATIONS, INC.,
Defendants,

NUVOX COMMUNICATIONS OF MISSOURI, INC.; SOCKET TELECOM, LLC; XO COMMUNICATIONS SERVICES, INC.; XO MISSOURI, INC.; XSPEDIUS MANAGEMENT CO. OF KANSAS CITY, LLC; XSPEDIUS MANAGEMENT CO. SWITCHED SERVICES, LLC,
Defendants-Appellants,

CHARTER FIBERLINK-MISSOURI, LLC; NAVIGATOR TELECOMMUNICATIONS, LLC; WILTEL LOCAL NETWORK, LLC; MCI COMMUNICATIONS SERVICES, INC.; MCIMETRO, LLC,
Defendants,

SPRINT COMMUNICATIONS COMPANY, L.P.,
Defendant-Appellee.

VERIZON NEW ENGLAND, INCORPORATED; VERIZON NEW YORK, INCORPORATED; VERIZON PENNSYLVANIA, INCORPORATED; VERIZON MARYLAND, INCORPORATED; VERIZON WASHINGTON, INCORPORATED; VERIZON VIRGINIA, INCORPORATED; *Amici* on Behalf of Appellee SOUTHWESTERN BELL TELEPHONE, L.P. doing business as SBC MISSOURI. SOUTHWESTERN BELL TELEPHONE, L.P., doing business as SBC Missouri,
Plaintiff-Appellee,

v.

MISSOURI PUBLIC SERVICE COMMISSION; JEFF DAVIS; CONNIE MURRAY; STEVE GAW; ROBERT M. CLAYTON III; LINWARD APPLING, in their official capacities as commissioners of the Missouri Public Service Commission and not as individuals,
Defendants-Appellants,

BIG RIVER TELEPHONE COMPANY, LLC; BIRCH TELECOM OF MISSOURI, INC.; IONEX COMMUNICATIONS, INC.; NUVOX COMMUNICATIONS OF MISSOURI, INC.; SOCKET TELECOM, LLC; XO COMMUNICATIONS SERVICES, INC.; XO MISSOURI, INC.; XSPEDIUS MANAGEMENT CO. OF KANSAS CITY, LLC; XSPEDIUS MANAGEMENT CO.SWITCHED SERVICES, LLC; CHARTER FIBERLINK-MISSOURI, LLC; NAVIGATOR TELECOMMUNICATIONS, LLC; SPRINT COMMUNICATIONS COMPANY, L.P.; WILTEL LOCAL NETWORK, LLC; MCI COMMUNICATIONS SERVICES, INC.; MCIMETRO, LLC,
Defendants.

SOUTHWESTERN BELL TELEPHONE, L.P., doing business as SBC MISSOURI,
Plaintiff-Appellant,

v.

MISSOURI PUBLIC SERVICE COMMISSION JEFF DAVIS; CONNIE MURRAY; STEVE GAW; ROBERT M. CLAYTON III; LINWARD APPLING, in their official capacities a commissioners of the Missouri Public Service Commission and not a individuals; BIG RIVER TELEPHONE COMPANY, LLC,

Defendants-Appellees,

NUVOX COMMUNICATIONS OF MISSOURI INC.; SOCKET TELECOM, LLC; XO COMMUNICATIONS SERVICES, INC.; XO MISSOURI, INC.; XSPEDIUS MANAGEMENT CO. OF KANSAS CITY, LLC; XSPEDIUS MANAGEMENT CO. SWITCHED SERVICES LLC,

Defendants Appellees,

SPRINT COMMUNICATIONS COMPANY, L.P.,

Defendant-Appellee,

BIRCH TELECOM OF MISSOURI, INC; IONEX COMMUNICATIONS, INC.,

Defendants,

CHARTER FIBERLINK-MISSOURI, LLC; NAVIGATOR TELECOMMUNICATIONS, LLC,

Defendants,

WILTEL LOCAL NETWORK, LLC; MCI COMMUNICATIONS SERVICES, INC.; MCIMETRO, LLC,

Defendants.

Submitted: June 14, 2007.
Filed: June 20, 2008.
Rehearing and Rehearing En Banc
Denied July 25, 2008.

Before BYE, RILEY, and BENTON,[1] Circuit Judges.

BYE, Circuit Judge.

Southwestern Bell Telephone, L.P., d/b/a SBC Missouri (SBC), attempted to negotiate interconnection agreements with several competitors (Competing Local Exchange Carriers (CLEC)) as required by the Telecommunications Act of 1996, Pub.L. No. 104-104, 110 Stat. 56 (codified as amended in scattered sections of 47 U.S.C.). When those negotiations failed, the dispute was submitted to arbitration as provided for under the Act and the resulting arbitrator's decision was adopted by the Missouri Public Service Commission (MPSC). SBC petitioned the district court[2] for review, arguing the MPSC exceeded its authority by ordering SBC to allow CLECs broader access to its facilities network than mandated by the Act. SBC also argued the MPSC erred in ordering it to provide CLECs access to entrance facilities at cost. The district court found the MPSC exceeded its authority when it decided issues relating to which network facilities SBC was required to make available to CLECs. The district court affirmed the MPSC's decision setting the rate SBC could charge CLECs for entrance facilities needed for interconnection. On appeal, the MPSC and various CLECs argue the district court erred in concluding the MPSC exceeded its authority. In its cross-appeal, SBC argues the district court erred in setting the rate it could charge for access to entrance facilities. We affirm.

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[1] Judge Duane Benton recused himself from further participation in this case following oral argument and did not participate in the decision. Pursuant to 8th Cir. R. 47E, the two remaining judges on the panel have decided the case.

[2] The Honorable Charles A. Shaw, United States District Judge for the Eastern District of Missouri.

I

For years, local telephone service was provided by companies holding monopolies which were subject to regulation by local governments. In passing the Telecommunications Act of 1996, Congress chose to encourage competition among telephone service providers and to impose greater federal regulation. The Act requires existing telephone companies, which previously held monopolies (Incumbent Local Exchange Carriers (ILEC)), to make their local facilities or networks available to newcomers-CLECs-for a fee, if the CLEC's ability to provide service was "impaired" without access. This appeal focuses on two sections of the Act which implemented these requirements-47 U.S.C. §§ 251 and 271.

Under § 251, all ILECs are required to negotiate interconnection agreements with impaired CLECs and to lease certain of their network facilities at cost-based rates known as "total element long-run incremental cost" (TELRIC). If an agreement cannot be negotiated, the Act requires unresolved § 251 disputes be submitted to arbitration. Section 251 compliance, including the arbitration process, is subject to oversight by state public service commissions.

Prior to 2005, the Federal Communications Commission (FCC) took the position ILECs were required under § 251 to make all basic elements of their local networks (Unbundled Network Elements-Platform (UNE or UNE-Platform)) available to CLECs at TELRIC rates. Courts reviewing the FCC's orders, however, disagreed when the practice caused the competition pendulum to swing too far in favor of CLECs. *See, e.g., AT & T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 390, 119 S.Ct. 721, 142 L.Ed.2d 835 (1999) ("[I]f Congress had wanted to give blanket access to incumbents' networks on a basis as unrestricted as the scheme the Commission has come up with . . . . It would simply have said . . . whatever requested element can be provided must be provided."); *U.S. Telecom Ass'n v. FCC*, 290 F.3d 415, 424 (D.C.Cir.2002) ("If parties who have not shared the risks are able to come in as equal partners on the successes, and avoid payment for the losers, the incentive to invest plainly declines."); *Verizon New England, Inc. v. Maine Pub. Utils. Comm'n*, 509 F.3d 1, 9 (1st Cir.2007) ("[M]aking a monopolist share . . . 'essential facilities' can promote competition; but it can also retard investment, handicap competition detrimentally, and discourage alternative means of achieving the same result that could conceivably enhance competition . . . ."). In 2005, the FCC issued its Triennial Review Remand Order (TRRO), which no longer required ILECs to make all elements of their local networks available under § 251 at TELRIC rates. *See* Order on Remand, *In the Matter of Unbundled Access to Network Elements, Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 20 F.C.C.R. 2533 (2005).

The TRRO also concluded CLECs were no longer impaired with respect to "entrance facilities" and ILECs were not required to provide such facilities as UNEs at TELRIC rates. An entrance facility is a connection between a switch maintained by an ILEC and a switch maintained by a CLEC. It is a means of transferring traffic from one carrier's network to another's, and facilitates an ILEC's obligation under the Act to interchange traffic among networks. CLECs also use entrance facilities to route customer traffic between a CLEC's customer and the CLEC's switch-a practice known as "backhauling." When used to transfer traffic from one network to another, entrance facilities are used for interconnection purposes. When used for backhauling, they are not used for interconnection. The TRRO found CLECs did not need entrance facilities for backhauling CLEC to CLEC traffic. Conversely, the TRRO reiterated that ILECs are required to provide entrance facilities at TELRIC rates under § 251(c)(2) if necessary for interconnection purposes.

In addition to § 251, which applies to all ILECs, § 271 imposes additional requirements on ILECs previously part of the Bell network (Bell Operating Companies (BOC)). Under § 271, BOCs wishing to enter the long-distance market must demonstrate they have, in addition to complying with § 251, made additional network facilities listed in a "competitive checklist" available to CLECs. Unlike § 251, the language of § 271 expressly states § 271 compliance is determined by the FCC.

Prior to 2005, § 271 compliance was not a contentious issue because the FCC's interpretation of § 251 required ILECs to provide § 271 network facilities as part of the § 251 agreements. It did not matter whether states had authority to force ILECs to comply with § 271, because they could order the same level of compliance by enforcing § 251. After the FCC issued its 2005 TRRO reducing the number of network facilities ILECs were required to make available, states and CLECs began exploring whether ILECs could be required to provide the same network facilities, *i.e.*, the UNE-Platform, by enforcing the competitive checklist requirements of § 271. That brings us to the primary issue in this case-the authority of states to enforce § 271.

After the Act was passed, SBC negotiated § 251 agreements with various CLECs and complied with the additional requirements of § 271. As SBC and the CLECs were in the process of renegotiating their § 251 agreements, the FCC issued its 2005 TRRO reducing the number of network facilities ILECs were required to make available. As a result, SBC refused to offer its UNE-Platform, leading to an impasse in § 251 negotiations. SBC took the position it no longer had to offer the full UNE-Platform at TELRIC rates. The CLECs contended, even though the § 251 requirements had changed, SBC could be required to make the same network facilities available under § 271.

SBC and the CLECs were unable to reach an agreement and the dispute was submitted to arbitration. The arbitrator, while recognizing he had no authority under § 251 to order SBC to make the disputed network facilities available, ordered them to be provided under § 271. Despite language in § 271 granting the FCC exclusive authority over § 271 disputes, the arbitrator held the states have implied authority to ensure ILECs comply with § 271. The arbitrator also held SBC was required to make its entrance facilities available to CLECs for interconnection purposes at TELRIC rates. The MPSC adopted the arbitrator's order. SBC appealed to the district court arguing the MPSC exceeded its authority when it ordered SBC to provide the disputed network facilities under § 271.

The district court affirmed in part, and reversed in part. It held the MPSC exceeded its authority by ordering the disputed network facilities provided under § 271, but affirmed the MPSC's decision setting the rate SBC could charge for entrance facilities needed for interconnection. On appeal, the MPSC and CLECs argue the structure of the Act implies Congress granted the states implicit authority to enforce § 271. SBC argues the FCC-not the states-has sole authority to enforce § 271. In its cross-appeal, SBC argues the Act no longer requires it to make entrance facilities available at TELRIC rates. Alternatively, assuming it must provide access for interconnection purposes, SBC argues the MPSC erred in finding the CLECs were using the entrance facilities for interconnection, and not backhauling.

II

We review the MPSC's interpretation and application of federal law de novo and will set aside its findings of fact only if they are arbitrary and capricious. *WWC License, L.L.C. v. Boyle*, 459 F.3d 880, 889-90 (8th Cir.2006). The parties agree this appeal involves the interpretation and application of federal law and de novo review applies.

The MPSC and CLECs concede the states have no authority to enforce § 271. Nonetheless, they contend Congress granted implicit authority by virtue of how the Act is structured. They argue the Act requires ILECs to enter into § 251 agreements with CLECs and those agreements are subject to mandatory state approval. They further argue ILECs seeking § 271 approval must, as a precondition, demonstrate they have obtained state approval of their § 251 agreements. Thus, a state can defeat an ILEC's attempt to win § 271 approval by withholding § 251 approval. They contend this ability to hamstring an ILEC's attempt to obtain § 271 approval means Congress intended to grant the states implicit authority to enforce § 271.

> Sections 251-52 provide for a dual federal-state regime: the FCC determines what UNE elements must be provided and sets pricing policy; state commissions oversee the adoption of agreements . . . providing such UNEs to competitors at prices based on those principles. 47 U.S.C. § 252(a), (b), (e), (f). Disputes as to the adoption of the agreements submitted to state commissions go to federal, rather than state, court for review, *id.* § 252(e), although implementation issues may arise in state proceedings. In short, the states have a major role under these sections.

Verizon New England, Inc., 509 F.3d at 7.

Conversely, the plain language of § 271 makes clear states have no authority to interpret or enforce the obligations of § 271. Section 271 contemplates two administrative determinations and Congress assigned both to the FCC. First, a BOC seeking § 271 approval must "apply to the Commission"-the FCC-and "the Commission" "shall issue a written determination approving or denying the authorization requested" after "[t]he Commission" determines whether the specified criteria, including the competitive checklist, are satisfied. § 271(d)(1), (3); 271(c)(2)(B).

Second, the FCC must address any enforcement issues. "The Commission shall establish procedures for the review of complaints" alleging a BOC is not complying with § 271; "the Commission shall act on such [a] complaint within 90 days"; and "the Commission may" take action to enforce the requirements of § 271 if "the Commission determines" a BOC is not in compliance with its obligations under § 271. § 271(d)(6).

Unlike the authority granted states under § 251, Congress only gave states an advisory role at the application stage of the § 271 process. The FCC is to "consult with the State commission of any State that is the subject of" a § 271 application before the FCC rules on the application. § 271(d)(2)(B). The FCC need not "give the State commissions' views any particular weight." *SBC Commc'ns Inc. v. FCC*, 138 F.3d 410, 416 (D.C.Cir.1998). Moreover, Congress did not grant states even an advisory role in addressing post-approval compliance issues. § 271(d)(6). "[A]ny complaint by [a CLEC] that [a BOC's] failure to provide [a certain form of network access] will violate § 271 is an issue for the FCC, not for [a state commission]." *Dieca Commc'ns, Inc. v. Florida Pub. Serv. Comm'n*, 447 F.Supp.2d 1281, 1286 (N.D.Fla.2006); *see Bellsouth Telecomms., Inc. v. Mississippi Pub. Serv. Comm'n*, 368 F.Supp.2d 557, 566 (S.D.Miss.2005). A state's role under § 271 is "limited" to "issuing a recommendation" regarding a § 271 application, and a state commission may not "parlay [its] limited role" into the authority to impose substantive requirements exclusively the prerogative of the FCC. *Indiana Bell Tel. Co. v. Indiana Util. Regulatory Comm'n*, 359 F.3d 493, 497 (7th Cir.2004).

"The contrast [between the language in §§ 251, 252, and 271] confirms that when Congress envisaged state commission power to implement the statute, it knew how to provide for it." *Verizon New England, Inc.*, 509 F.3d at 7. Accordingly, we join those federal courts which have concluded the FCC has exclusive jurisdiction over § 271. *See, e.g., Id.* at 7-8 (noting the majority of federal courts and state public service commissions treat § 271 as within the exclusive authority of the FCC); *Indiana Bell Tel. Co.*, 359 F.3d at 495 ("The Act reserves to the FCC the authority to decide whether to grant a section 271 application.").

III

In its cross-appeal, SBC argues the district court erred in affirming the MPSC's order holding CLECs are entitled to access SBC's entrance facilities for interconnection purposes at TELRIC rates. SBC argues the order conflicts with FCC rulings holding CLECs are no longer impaired with respect to entrance facilities and not entitled to them as UNEs.

The MPSC acknowledged the FCC's ruling stating CLECs are not entitled to entrance facilities as UNEs, but required SBC to allow access pursuant to § 251(c)(2), which requires ILECs to provide interconnection to CLECs. The District Court concluded the MPSC's order correctly implemented the FCC's rulings. Further, it rejected SBC's argument the FCC only requires an ILEC to allow CLECs to interconnect with its network but does not require it to lease the interconnection facilities themselves.

The FCC has held CLECs are not impaired without access to entrance facilities and are not entitled to entrance facilities as UNEs under § 251(c)(3). The FCC's finding of non-impairment does not, however, alter the right of CLECs to obtain interconnection facilities pursuant to § 251(c)(2) for transmission and routing of telephone exchange service and exchange access service, *i.e.*, CLEC to ILEC and ILEC to CLEC traffic. The FCC determined when a CLEC uses entrance facilities to carry traffic to and from its own end users, *i.e.*, backhauling or CLEC to CLEC, the CLEC is not entitled to obtain entrance facilities as UNEs at TELRIC rates. If a CLEC needs entrance facilities to interconnect with an ILEC's network, it has the right to obtain such facilities from the ILEC. Thus, CLECs must be provided access at TELRIC rates if necessary to interconnect with the ILEC's network. *See Illinois Bell Tel. Co. v. Box*, 526 F.3d 1069, at 1071-1072, 2008 WL 2151573, at 2-3 (7th Cir.2008).

Additionally, "interconnection" means the physical linking of two networks for the mutual exchange of traffic. The term "interconnect" refers to "'facilities and equipment,' not to the provision of any service." *AT & T Corp. v. FCC*, 317 F.3d 227, 234-35 (D.C. Cir.2003) (interpreting the term interconnect in § 251(a)(1)); *see Competitive Telecomms Ass'n v. FCC*, 117 F.3d 1068, 1072 (8th Cir.1997) (stating interconnection as used in § 251(c)(2) means "a physical link between the equipment of the carrier seeking interconnection and the LEC's network.").

The MPSC found, and the district court agreed, the entrance facilities requested by the CLECs would be used solely for interconnection purposes within the meaning of § 251(c)(2). Nothing in the record suggests the finding was arbitrary or capricious. Further, the district court correctly concluded SBC was required to provide a physical link to CLECs for access to its entrance facilities as necessary for interconnection at TELRIC rates.

IV

The judgment of the district court is affirmed.

APPENDIX D

UNITED STATES COURT OF APPEALS,
SEVENTH CIRCUIT.

Nos. 07-3557, 07-3683.

ILLINOIS BELL TELEPHONE COMPANY,
Plaintiff-Appellant, Cross-Appellee,

v.

CHARLES E. BOX, *et al.*, COMMISSIONERS OF THE
ILLINOIS COMMERCE COMMISSION,
Defendants-Appellees, Cross-Appellants,

and

ACCESS ONE, INC., *et al.*,
Intervening Defendants-Appellees.

Argued May 6, 2008.
Decided May 23, 2008.

Before EASTERBROOK, *Chief Judge*, and WOOD and TINDER, *Circuit Judges.*

EASTERBROOK, *Chief Judge*.

The Telecommunications Act of 1996 directs established local phone companies—successors to the Bell Operating Companies that were subsidiaries of AT & T before its breakup in 1983—to lease parts of their networks to rivals on an à la carte basis. 47 U.S.C. § 251(c)(3). Particular circuits or services, called unbundled network elements, must be furnished at a price, and under conditions, specified by the Federal

Communications Commission. Its method of setting the price, called TELRIC (for total element long-run incremental cost), was approved by *Verizon Communications Inc. v. FCC*, 535 U.S. 467, 122 S.Ct. 1646, 152 L.Ed.2d 701 (2002). That decision disapproved some of the FCC's views about which elements must be made available, however, and many questions remained open until the FCC's regulations in the wake of its third Triennial Review were approved by the D.C. Circuit. *Covad Communications Co. v. FCC*, 450 F.3d 528 (D.C.Cir.2006).

Today's case poses two questions about incumbents' obligations under the FCC's regulations. The first is whether these firms, called ILECs (for incumbent local exchange carriers), must allow their rivals, called CLECs (for competitive local exchange carriers), to use "entrance facilities" at TELRIC prices for interconnection (that is, transferring voice and data traffic from a CLEC's network to the ILEC's, and the reverse). The second is whether ILECs must lease fiber-optic circuits to deliver voice and data services to the CLECs' business customers. The 1996 Act provides that, when phone companies cannot agree on the answer to questions such as these, state public-utility commissions may decide. 47 U.S.C. § 252(b). The statute misleadingly calls this process "arbitration," but it bears none of the features—such as voluntary consent, a privately chosen adjudicator, and finality—that marks normal arbitration. See generally *AT & T Communications of Illinois, Inc. v. Illinois Bell Telephone Co.*, 349 F.3d 402 (7th Cir. 2003); *MPower Communications Corp. v. Illinois Bell Telephone Co.*, 457 F.3d 625 (7th Cir.2006). The state commission's decisions don't implement private agreements; they subject unwilling ILECs to public commands.

The Illinois Commerce Commission concluded that Illinois Bell, the ILEC in northern Illinois-which does business as AT & T following a series of corporate transactions that need not be recounted-must allow CLECs to use entrance facilities at TELRIC prices. It also concluded that AT & T must allow the CLECs to use its fiber-optic loops, except for service to "mass-market customers." The 1996 Act allows such decisions by state agencies to be reviewed by federal courts. See *Verizon Maryland Inc. v. Public Service Commission of Maryland*, 535 U.S. 635, 122 S.Ct. 1753, 152 L.Ed.2d 871 (2002). The district judge concluded that the state commission was right about entrance facilities and wrong about fiber-optic loops. See *Illinois Bell Telephone Co. v. Box*, 2007 WL 2815924, 2007 U.S. Dist. LEXIS 70551 (N.D.Ill. Sept. 21, 2007). AT & T has appealed on the entrance-facility issue; the commission has appealed on the local-loops issue.

An "entrance facility" is a connection between a switch maintained by an ILEC and a switch maintained by a CLEC. In other words, it is a means of transferring traffic from one carrier's network to another. The connection may be by copper cable, fiber-optic cable, or radio-frequency link. The connection may be long or short; multiple carriers' switches may even be in the same building (this is known as co-location). ILECs built entrance facilities to comply with their obligation to interchange traffic among networks. 47 U.S.C. § 251(c)(2). Once the links between ILECs and CLECs networks existed, CLECs began to use them to transport traffic from the customers of one CLEC to the customers of another, using the ILEC's circuits as intermediaries. A given CLEC also might route traffic among its own customers over the ILEC's network. Using an entrance facility to move voice or data traffic among CLEC customers has come to be known as "backhauling," though again the nomenclature is misleading: intra-CLEC traffic is related only loosely to loading freight on a truck, train, or boat at its destination for delivery to the vehicle's point of origin.

In the third Triennial Review Remand Order, the FCC concluded that CLECs do not need entrance facilities for backhauling and should build their own equipment for handling CLEC-to-CLEC traffic. ILECs need not provide unbundled network elements to CLECs that can serve customers without "impairment" through their own network elements. 47 U.S.C. § 251(d)(2)(B). ("Impairment" is a complex concept that need not be explicated here.) No one contests the FCC's conclusion in this litigation.

What then of the original (and principal) use of an entrance facility: linking networks to allow CLEC-to-ILEC traffic (and ILEC-to-CLEC traffic)? The FCC stated:

> [O]ur finding of non-impairment with respect to entrance facilities does not alter the right of [CLECs] to obtain interconnection facilities pursuant to section 251(c)(2) for the transmission and routing of telephone exchange service and exchange access service. Thus, [CLECs] will have access to these facilities at cost-based rates to the extent that they require them to interconnect with the [ILEC's] network.

Triennial Review Remand Order at ¶ 140. The state commission relied on this passage when ordering AT & T to make entrance facilities available at TELRIC prices to CLECs for interconnection.

AT & T protests that this nullifies the FCC's order. What's the point of specifying that CLECs cannot demand access to entrance facilities as unbundled network elements, AT & T inquires, if state commissions can turn around and require the same access at the same price anyway? The answer, as the district court observed, is that CLECs do not enjoy the "same" access to entrance facilities under the state commission's decision as they did before the FCC's order. Until then CLECs could use entrance facilities for both interconnection and backhauling. Under the state's order, CLECs use entrance facilities exclusively for interconnection, just as the FCC said in ¶ 140. The state commission tells us that ILECs can detect and block any attempted use of an entrance facility for backhauling. (Every carrier, ILEC or CLEC, must be able to determine the traffic's destination in order to route it accurately.)

Section 251(c)(2) allows a CLEC to interconnect at any technologically feasible place. An entrance facility, designed for the very purpose of linking two carriers' networks, meets the requirement of feasibility, so a CLEC is entitled to hand off traffic to an ILEC at any entrance facility. The real dispute is not whether entrance facilities will be used for interconnection, but how much the ILEC can charge. Apparently AT & T has filed tariffs for the use of entrance facilities as interconnection gateways, and the tariffs specify prices exceeding the fee calculated according to TELRIC. AT & T wants to be able to charge the tariff price. Whether it can do so is not related to the scope of an ILEC's obligations under § 251(c)(3) to furnish unbundled network elements.

What the FCC said in ¶ 140 is that ILECs must allow use of entrance facilities for interconnection at "cost-based rates". TELRIC is a cost-based rate, though not the only one. We asked at oral argument whether anything in the 1996 Act or the FCC's regulations prohibits a state commission from using TELRIC to tell ILECs what they may charge for interconnection. Counsel for AT & T allowed that the state commission could do this. Well, that is effectively what the state commission has done. Instead of suspending AT & T's tariff for interconnection services and ordering a rate reduction, the state commission has reached the same result by an "arbitration" under the 1996 Act. If there is any objection to this procedure, it must rest on state rather than federal law. Whether the state commission has followed the requirements that Illinois imposes for overriding a utility's published tariff is of no consequence in this federal suit. It is enough for us to conclude that federal law permits a state agency to use the TELRIC method to regulate the price for the interconnection services that an ILEC must furnish under § 251(c)(2).

On to optical fiber. The CLECs want, and the state commission ordered AT & T to provide, local loops that include optical fiber. A "local loop" is the set of wires and routing facilities needed to transmit a signal between a switch and a customer's premises. New entrants find local loops the most valuable unbundled network elements, because the switch-to customer connection is the most costly to build from scratch. (A belief that the local loop was a natural monopoly was a principal reason for regulating the Bell Operating Companies in the first place.) Regulations implementing the 1996 Act require ILECs such as AT & T to supply CLECs with local loops based on copper wire. More recently both ILECs and CLECs have added circuits based on optical fiber, which is cheaper than copper wire and can carry more traffic. Telecom firms may build new loops entirely from fiber; these are called "fiber to the home" or FTTH (whether "home" is a residence or an office). More commonly optical fiber is used to connect a switch to a junction near a home or office, and wire installed long ago carries the signal into the customer's premises; these loops are called "fiber to the curb" or FTTC. Finally, there are hybrid loops "composed of both fiber optic cable, usually in the feeder plant, and copper wire or cable". 47 C.F.R. § 51.319(a)(2).

Federal regulations provide that ILECs need not provide optical loops to rival carriers, and, although hybrid loops must be supplied as unbundled network elements, the incumbents are entitled to restrict the use to which these may be put. 47 C.F.R. § 51.319 (a)(2), (3). The FCC found that CLECs' access to ILECs' loops based on traditional copper wire means that they are not "impaired" by lack of access to ILECs' loops based on optical fiber. Carriers are building new circuits using optical fiber; the FCC concluded that CLECs, no less than the ILECs, can and should do this for themselves. As long as CLECs rely on network elements supplied by ILECs, real competition is hampered; the ILECs' facilities continue to be monopolies and require regulation. See Graeme Guthrie, *Regulating Infrastructure: The Impact on Risk and Investment*, 44 J. Econ. Literature 925 (2006). One goal of the 1996 Acts' "impairment" clauses is to wean CLECs from reliance on unbundled network elements so that fully competitive landline networks will be built, now that there is widespread agreement that local service is no longer a natural monopoly.

The state commission understood the FCC's regulation as limited to "mass-market customers" (which the state commission defined as those that use fewer than 4 phone circuits) and directed AT & T to furnish optical and hybrid local loops between central offices and all other customers to its rivals as unbundled network elements. The district court set this portion of the state commission's order aside, and sensibly.

Although the parties spend a good deal of time debating what the FCC "intended" by its regulation, it is enough to implement what the FCC said. The regulation as written is unqualified. It says that ILECs need not furnish optical-fiber local loops as unbundled network elements and may restrict the use to which CLECs put hybrid loops. Nothing turns on the customer's identity or the number of phone lines a given customer uses. Access to copper-based loops is available for all customers; that's why the FCC concluded that access to optical loops is not required to avoid impairment.

Commentary in the Triennial Review Order shows that the regulations mean what they say. The FCC wrote that, "in light of a competitive landscape in which [CLECs] are leading the deployment of [fiber to the home], removing unbundling obligations on [fiber to the home] loops will promote their deployment of the network infrastructure necessary to provide broadband services to the mass market." Order at ¶ 278. It added: "though our loop unbundling analysis focuses upon the customer classes most likely to be served by a specific type of loop, the unbundling rules we adopt apply with equal force to every customer served by that loop type." *Id.* at ¶ 197 n. 623. And it drove the point home at ¶ 210: "while we adopt loop unbundling rules specific to each loop type, our unbundling obligations and limitations for such loops do not vary based on the customer to be served." The state commission's order, which does make the obligation "vary based on the customer to be served", is preempted by the FCC's rules.

One final issue requires brief treatment. The district court implemented its decision by issuing an injunction. The state commission does not dispute the order's adequacy under Fed.R.Civ.P. 65(d) but does say that the district court should have used a kinder, gentler, remedy, such as a declaratory judgment. Perhaps this would be right-if this suit were an action for review of administrative action after the fashion of the Administrative Procedure Act. The 1996 Act authorizes judicial review of state agencies' decisions along the APA's lines. 47 U.S.C. § 252(e)(6). But state agencies objected, saying that direct review would impinge on their sovereignty. The Supreme Court finessed that question in *Verizon Maryland* by holding that, whether or not § 252(e)(6) properly authorizes suits against states or state agencies in their own names, state commissions' decisions may be reviewed indirectly in suits against commissioners, in their official capacity.

In other words, the Court concluded, *Ex parte Young*, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908), comes to much the same end as § 252(e)(6). Two things distinguish suits under *Ex parte Young* from direct review. First, the state and its agency are not named parties to the suit. Second, to ensure that the state is nonetheless bound by the decision, an injunction issues against state actors in their official capacities. *Verizon Maryland* treated injunctions as the normal outcome of such proceedings, and declaratory judgments as permissible (but not required) supplements. 535 U.S. at 645-48, 122 S.Ct. 1753. The state commission's members do not tell us why the court should proceed otherwise today; indeed, their brief does not even cite *Verizon Maryland*.

Illinois is free to waive its sovereign immunity and consent to litigation under § 252(e)(6). If it does so, and the state (or its agency) becomes a formal party, then a district court should enter the same sort of judgment that would be appropriate in cases against federal agencies under the APA. As long as a state insists that the approach of *Ex parte Young* be used, however, an injunction is the normal remedy.

AFFIRMED

C.A.7 (Ill.),2008.
Illinois Bell Telephone Co. v. Box
526 F.3d 1069, 45 Communications Reg. (P&F) 220

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APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Nos. 07-2469/2473

MICHIGAN BELL TELEPHONE COMPANY,
Plaintiff-Appellee (07-2469/2473),

v.

COVAD COMMUNICATIONS COMPANY, *et al.*,
Intervenors Defendants Appellants (07-2469),
Intervenors (07-2473),

MCLEODUSA TELECOMMUNICATIONS SERVICES, INC., *et al.*
Intervenors (07-2469),

J. PETER LARK, COMMISSIONER, *et al.*,
Defendants (07-2469),

LAURA CHAPPELLE, *et al.*,
Defendants-Appellants (07-2473).

ORDER

BEFORE: BATCHELDER, *Chief Judge*; GILMAN and SUTTON, *Circuit Judges*.

The court having received two petitions for rehearing en banc, which were circulated to all active judges of this court, none of whom requested a vote on the suggestion for rehearing en banc, the petitions for rehearing have been referred to the original panel.

The panel has further reviewed the petitions for rehearing and concludes that the issues raised in the petitions were fully considered upon the original submission and decision of the cases. Accordingly, the petitions are denied. Judge Sutton would grant rehearing for the reasons stated in his dissent.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
Leonard Green, Clerk

APPENDIX F

United States Code Annotated
Title 47. Telegraphs, Telephones, and Radiotelegraphs
Chapter 5. Wire or Radio Communication
Subchapter II. Common Carriers
Part II. Development of Competitive Markets

§ 251. Interconnection

(a) General duty of telecommunications carriers

Each telecommunications carrier has the duty—

(1) to interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers; and

(2) not to install network features, functions, or capabilities that do not comply with the guidelines and standards established pursuant to section 255 or 256 of this title.

(b) Obligations of all local exchange carriers

Each local exchange carrier has the following duties:

(1) Resale

The duty not to prohibit, and not to impose unreasonable or discriminatory conditions or limitations on, the resale of its telecommunications services.

(2) Number portability

The duty to provide, to the extent technically feasible, number portability in accordance with requirements prescribed by the Commission.

(3) Dialing parity

The duty to provide dialing parity to competing providers of telephone exchange service and telephone toll service, and the duty to permit all such providers to have nondiscriminatory access to telephone numbers, operator services, directory assistance, and directory listing, with no unreasonable dialing delays.

(4) Access to rights-of-way

The duty to afford access to the poles, ducts, conduits, and rights-of-way of such carrier to competing providers of telecommunications services on rates, terms, and conditions that are consistent with section 224 of this title.

(5) Reciprocal compensation

The duty to establish reciprocal compensation arrangements for the transport and termination of telecommunications.

(c) Additional obligations of incumbent local exchange carriers

In addition to the duties contained in subsection (b) of this section, each incumbent local exchange carrier has the following duties:

(1) Duty to negotiate

The duty to negotiate in good faith in accordance with section 252 of this title the particular terms and conditions of agreements to fulfill the duties described in paragraphs (1) through (5) of subsection (b) of this section and this subsection. The requesting telecommunications carrier also has the duty to negotiate in good faith the terms and conditions of such agreements.

(2) Interconnection

The duty to provide, for the facilities and equipment of any requesting telecommunications carrier, interconnection with the local exchange carrier's network—

(A) for the transmission and routing of telephone exchange service and exchange access;

(B) at any technically feasible point within the carrier's network;

(C) that is at least equal in quality to that provided by the local exchange carrier to itself or to any subsidiary, affiliate, or any other party to which the carrier provides interconnection; and

(D) on rates, terms, and conditions that are just, reasonable, and nondiscriminatory, in accordance with the terms and conditions of the agreement and the requirements of this section and section 252 of this title.

(3) Unbundled access

The duty to provide, to any requesting telecommunications carrier for the provision of a telecommunications service, nondiscriminatory access to network elements on an unbundled basis at any technically feasible point on rates, terms, and conditions that are just, reasonable, and nondiscriminatory in accordance with the terms and conditions of the agreement and the requirements of this section and section 252 of this title. An incumbent local exchange carrier shall provide such unbundled network elements in a manner that allows requesting carriers to combine such elements in order to provide such telecommunications service.

(4) Resale

The duty—

(A) to offer for resale at wholesale rates any telecommunications service that the carrier provides at retail to subscribers who are not telecommunications carriers; and

(B) not to prohibit, and not to impose unreasonable or discriminatory conditions or limitations on, the resale of such telecommunications service, except that a State commission may, consistent with regulations prescribed by the Commission under this section, prohibit a reseller that obtains at wholesale rates a telecommunications ser-vice that is available at retail only to a category of subscribers from offering such service to a different category of subscribers.

(5) Notice of changes

The duty to provide reasonable public notice of changes in the information necessary for the transmission and routing of services using that local exchange carrier's facilities or networks, as well as of any other changes that would affect the interoperability of those facilities and networks.

(6) Collocation

The duty to provide, on rates, terms, and conditions that are just, reasonable, and nondiscriminatory, for physical collocation of equipment necessary for interconnection or access to unbundled network elements at the premises of the local exchange carrier, except that the carrier may provide for virtual collocation if the local exchange carrier demonstrates to the State commission that physical collocation is not practical for technical reasons or because of space limitations.

(d) Implementation

(1) In general

Within 6 months after February 8, 1996, the Commission shall complete all actions necessary to establish regulations to implement the requirements of this section.

(2) Access standards

In determining what network elements should be made available for purposes of subsection (c)(3) of this section, the Commission shall consider, at a minimum, whether—

(A) access to such network elements as are proprietary in nature is necessary; and

(B) the failure to provide access to such network elements would impair the ability of the telecommunications carrier seeking access to provide the services that it seeks to offer.

(3) Preservation of State access regulations

In prescribing and enforcing regulations to implement the requirements of this section, the Commission shall not preclude the enforcement of any regulation, order, or policy of a State commission that—

(A) establishes access and interconnection obligations of local exchange carriers;

(B) is consistent with the requirements of this section; and

(C) does not substantially prevent implementation of the requirements of this section and the purposes of this part.

(e) Numbering administration

(1) Commission authority and jurisdiction

The Commission shall create or designate one or more impartial entities to administer telecommunications numbering and to make such numbers available on an equitable basis. The Commission shall have exclusive jurisdiction over those portions of the North American Numbering Plan that pertain to the United States. Nothing in this paragraph shall preclude the Commission from delegating to State commissions or other entities all or any portion of such jurisdiction.

(2) Costs

The cost of establishing telecommunications numbering administration arrangements and number portability shall be borne by all telecommunications carriers on a competitively neutral basis as determined by the Commission.

(3) Universal emergency telephone number

The Commission and any agency or entity to which the Commission has delegated authority under this subsection shall designate 9-1-1 as the universal emergency telephone number within the United States for reporting an emergency to appropriate authorities and requesting assistance. The designation shall apply to both wireline and wireless telephone service. In making the designation, the Commission (and any such agency or entity) shall provide appropriate transition periods for areas in which 9-1-1 is not in use as an emergency telephone number on October 26, 1999.

(f) Exemptions, suspensions, and modifications

(1) Exemption for certain rural telephone companies

(A) Exemption

Subsection (c) of this section shall not apply to a rural telephone company until (i) such company has received a bona fide request for interconnection, services, or network elements, and (ii) the State commission determines (under subparagraph (B)) that such request is not unduly economically burdensome, is technically feasible, and is consistent with section 254 of this title (other than subsections (b)(7) and (c)(1)(D) thereof).

(B) State termination of exemption and implementation schedule

The party making a bona fide request of a rural telephone company for interconnection, services, or network elements shall submit a notice of its request to the State commission. The State commission shall conduct an inquiry for the purpose of determining whether to terminate the exemption under subparagraph (A). Within 120 days after the State commission receives notice of the request, the State commission shall terminate the exemption if the request is not unduly economically burdensome, is technically feasible, and is consistent with section 254 of this title (other than subsections (b)(7) and (c)(1)(D) thereof). Upon termination of the exemption, a State commission shall establish an implementation schedule for compliance with the request that is consistent in time and manner with Commission regulations.

(C) Limitation on exemption

The exemption provided by this paragraph shall not apply with respect to a request under subsection (c) of this section, from a cable operator providing video programming, and seeking to provide any telecommunications service, in the area in which the rural telephone company provides video programming. The limitation contained in this subparagraph shall not apply to a rural telephone company that is providing video programming on February 8, 1996.

(2) Suspensions and modifications for rural carriers

A local exchange carrier with fewer than 2 percent of the Nation's subscriber lines installed in the aggregate nationwide may petition a State commission for a suspension or modification of the application of a requirement or requirements of subsection (b) or (c) of this section to telephone exchange service facilities specified in such petition. The State commission shall grant such petition to the extent that, and for such duration as, the State commission determines that such suspension or modification—

(A) is necessary—

(i) to avoid a significant adverse economic impact on users of telecommunications services generally;

(ii) to avoid imposing a requirement that is unduly economically burdensome; or

(iii) to avoid imposing a requirement that is technically infeasible; and

(B) is consistent with the public interest, convenience, and necessity.

The State commission shall act upon any petition filed under this paragraph within 180 days after receiving such petition. Pending such action, the State commission may suspend enforcement of the requirement or requirements to which the petition applies with respect to the petitioning carrier or carriers.

(g) Continued enforcement of exchange access and interconnection requirements

On and after February 8, 1996, each local exchange carrier, to the extent that it provides wireline services, shall provide exchange access, information access, and exchange services for such access to interexchange carriers and information service providers in accordance with the same equal access and nondiscriminatory interconnection restrictions and obligations (including receipt of compensation) that apply to such carrier on the date immediately preceding February 8, 1996 under any court order, consent decree, or regulation, order, or policy of the Commission, until such restrictions and obligations are explicitly superseded by regulations prescribed by the Commission after February 8, 1996. During the period beginning on February 8, 1996 and until such restrictions and obligations are so superseded, such restrictions and obligations shall be enforceable in the same manner as regulations of the Commission.

(h) Definition of incumbent local exchange carrier

(1) Definition

For purposes of this section, the term 'incumbent local exchange carrier' means, with respect to an area, the local exchange carrier that—

(A) on February 8, 1996, provided telephone exchange service in such area; and

(B)(i) on February 8, 1996, was deemed to be a member of the exchange carrier association pursuant to section 69.601(b) of the Commission's regulations (47 C.F.R. 69.601(b)); or

(ii) is a person or entity that, on or after February 8, 1996, became a successor or assign of a member described in clause (i).

(2) Treatment of comparable carriers as incumbents

The Commission may, by rule, provide for the treatment of a local exchange carrier (or class or category thereof) as an incumbent local exchange carrier for purposes of this section if—

(A) such carrier occupies a position in the market for telephone exchange service within an area that is comparable to the position occupied by a carrier described in paragraph (1);

(B) such carrier has substantially replaced an incumbent local exchange carrier described in paragraph (1); and

(C) such treatment is consistent with the public interest, convenience, and necessity and the purposes of this section.

(i) Savings provision

Nothing in this section shall be construed to limit or otherwise affect the Commission's authority under section 201 of this title.

United States Code Annotated

Title 47. Telegraphs, Telephones,
and Radiotelegraphs
Chapter 5. Wire or Radio Communication
Subchapter II. Common Carriers
Part II. Development of Competitive Markets

§ 252. Procedures for negotiation, arbitration, and approval of agreements

(a) Agreements arrived at through negotiation

(1) Voluntary negotiations

Upon receiving a request for interconnection, services, or network elements pursuant to section 251 of this title, an incumbent local exchange carrier may negotiate and enter into a binding agreement with the requesting telecommunications carrier or carriers without regard to the standards set forth in subsections (b) and (c) of section 251 of this title. The agreement shall include a detailed schedule of itemized charges for interconnection and each service or network element included in the agreement. The agreement, including any interconnection agreement negotiated before February 8, 1996, shall be submitted to the State commission under subsection (e) of this section.

(2) Mediation

Any party negotiating an agreement under this section may, at any point in the negotiation, ask a State commission to participate in the negotiation and to mediate any differences arising in the course of the negotiation.

(b) Agreements arrived at through compulsory arbitration

(1) Arbitration

During the period from the 135th to the 160th day (inclusive) after the date on which an incumbent local exchange carrier receives a request for negotiation under this section, the carrier or any other party to the negotiation may petition a State commission to arbitrate any open issues.

(2) Duty of petitioner

(A) A party that petitions a State commission under paragraph (1) shall, at the same time as it submits the petition, provide the State commission all relevant documentation concerning—

(i) the unresolved issues;

(ii) the position of each of the parties with respect to those issues; and

(iii) any other issue discussed and resolved by the parties.

(B) A party petitioning a State commission under paragraph (1) shall provide a copy of the petition and any documentation to the other party or parties not later than the day on which the State commission receives the petition.

(3) Opportunity to respond

A non-petitioning party to a negotiation under this section may respond to the other party's petition and provide such additional information as it wishes within 25 days after the State commission receives the petition.

(4) Action by State commission

(A) The State commission shall limit its consideration of any petition under paragraph (1) (and any response thereto) to the issues set forth in the petition and in the response, if any, filed under paragraph (3).

(B) The State commission may require the petitioning party and the responding party to provide such information as may be necessary for the State commission to reach a decision on the unresolved issues. If any party refuses or fails unreasonably to respond on a timely basis to any reasonable request from the State commission, then the State commission may proceed on the basis of the best information available to it from whatever source derived.

(C) The State commission shall resolve each issue set forth in the petition and the response, if any, by imposing appropriate conditions as required to implement subsection (c) of this section upon the parties to the agreement, and shall conclude the resolution of any unresolved issues not later than 9 months after the date on which the local exchange carrier received the request under this section.

(5) Refusal to negotiate

The refusal of any other party to the negotiation to participate further in the negotiations, to cooperate with the State commission in carrying out its function as an arbitrator, or to continue to negotiate in good faith in the presence, or with the assistance, of the State commission shall be considered a failure to negotiate in good faith.

(c) Standards for arbitration

In resolving by arbitration under subsection (b) of this section any open issues and imposing conditions upon the parties to the agreement, a State commission shall—

(1) ensure that such resolution and conditions meet the requirements of section 251 of this title, including the regulations prescribed by the Commission pursuant to section 251 of this title;

(2) establish any rates for interconnection, services, or network elements according to subsection (d) of this sec-tion; and

(3) provide a schedule for implementation of the terms and conditions by the parties to the agreement.

(d) Pricing standards

(1) Interconnection and network element charges

Determinations by a State commission of the just and reasonable rate for the interconnection of facilities and equipment for purposes of subsection (c)(2) of section 251 of this title, and the just and reasonable rate for network elements for purposes of subsection (c)(3) of such section—

(A) shall be—

(i) based on the cost (determined without reference to a rate-of-return or other rate-based proceeding) of providing the interconnection or network element (whichever is applicable), and

(ii) nondiscriminatory, and

(B) may include a reasonable profit.

(2) Charges for transport and termination of traffic

(A) In general

For the purposes of compliance by an incumbent local exchange carrier with section 251(b)(5) of this title, a State commission shall not consider the terms and conditions for reciprocal compensation to be just and reasonable unless—

(i) such terms and conditions provide for the mutual and reciprocal recovery by each carrier of costs associated with the transport and termination on each carrier's network facilities of calls that originate on the network facilities of the other carrier; and

(ii) such terms and conditions determine such costs on the basis of a reasonable approximation of the additional costs of terminating such calls.

(B) Rules of construction

This paragraph shall not be construed—

(i) to preclude arrangements that afford the mutual recovery of costs through the offsetting of reciprocal obligations, including arrangements that waive mutual recovery (such as bill-and-keep arrangements); or

(ii) to authorize the Commission or any State commission to engage in any rate regulation proceeding to establish with particularity the additional costs of transporting or terminating calls, or to require carriers to maintain records with respect to the additional costs of such calls.

(3) Wholesale prices for telecommunications services

For the purposes of section 251(c)(4) of this title, a State commission shall determine wholesale rates on the basis of retail rates charged to subscribers for the telecommunications service requested, excluding the portion thereof attributable to any marketing, billing, collection, and other costs that will be avoided by the local exchange carrier.

(e) Approval by State commission

(1) Approval required

Any interconnection agreement adopted by negotiation or arbitration shall be submitted for approval to the State commission. A State commission to which an agreement is submitted shall approve or reject the agreement, with written findings as to any deficiencies.

(2) Grounds for rejection

The State commission may only reject

(A) an agreement (or any portion thereof) adopted by negotiation under subsection (a) of this section if it finds that—

(i) the agreement (or portion thereof) discriminates against a telecommunications carrier not a party to the agreement; or

(ii) the implementation of such agreement or portion is not consistent with the public interest, convenience, and necessity; or

(B) an agreement (or any portion thereof) adopted by arbitration under subsection (b) of this section if it finds that the agreement does not meet the requirements of section 251 of this title, including the regulations prescribed by the Commission pursuant to section 251 of this title, or the standards set forth in subsection (d) of this section.

(3) Preservation of authority

Notwithstanding paragraph (2), but subject to section 253 of this title, nothing in this section shall prohibit a State commission from establishing or enforcing other requirements of State law in its review of an agreement, including requiring compliance with intrastate telecommunications service quality standards or requirements.

(4) Schedule for decision

If the State commission does not act to approve or reject the agreement within 90 days after submission by the parties of an agreement adopted by negotiation under subsection (a) of this section, or within 30 days after submission by the parties of an agreement adopted by arbitration under subsection (b) of this section, the agreement shall be deemed approved. No State court shall have jurisdiction to review the action of a State commission in approving or rejecting an agreement under this section.

(5) Commission to act if State will not act

If a State commission fails to act to carry out its responsibility under this section in any proceeding or other matter under this section, then the Commission shall issue an order preempting the State commission's jurisdiction of that proceeding or matter within 90 days after being notified (or taking notice) of such failure, and shall assume the responsibility of the State commission under this section with respect to the proceeding or matter and act for the State commission.

(6) Review of State commission actions

In a case in which a State fails to act as described in paragraph (5), the proceeding by the

Commission under such paragraph and any judicial review of the Commission's actions shall be the exclusive remedies for a State commission's failure to act. In any case in which a State commission makes a determination under this section, any party aggrieved by such determination may bring an action in an appropriate Federal district court to determine whether the agreement or statement meets the requirements of section 251 of this title and this section.

(f) Statements of generally available terms

(1) In general

A Bell operating company may prepare and file with a State commission a statement of the terms and conditions that such company generally offers within that State to comply with the requirements of section 251 of this title and the regulations thereunder and the standards applicable under this section.

(2) State commission review

A State commission may not approve such statement unless such statement complies with subsection (d) of this section and section 251 of this title and the regulations thereunder. Except as provided in section 253 of this title, nothing in this section shall prohibit a State commission from establishing or enforcing other requirements of State law in its review of such statement, including requiring compliance with intrastate telecommunications service quality standards or requirements.

(3) Schedule for review

The State commission to which a statement is submitted shall, not later than 60 days after the date of such submission—

(A) complete the review of such statement under paragraph (2) (including any reconsideration thereof), unless the submitting carrier agrees to an extension of the period for such review; or

(B) permit such statement to take effect.

(4) Authority to continue review

Paragraph (3) shall not preclude the State commission from continuing to review a statement that has been permitted to take effect under subparagraph (B) of such paragraph or from approving or disapproving such statement under paragraph (2).

(5) Duty to negotiate not affected

The submission or approval of a statement under this subsection shall not relieve a Bell operating company of its duty to negotiate the terms and conditions of an agreement under section 251 of this title.

(g) Consolidation of State proceedings

Where not inconsistent with the requirements of this chapter, a State commission may, to the extent practical, consolidate proceedings under sections 214(e), 251(f), 253 of this title, and this section in order to reduce administrative burdens on telecommunications carriers, other parties to the proceedings, and the State commission in carrying out its responsibilities under this chapter.

(h) Filing required

A State commission shall make a copy of each agreement approved under subsection (e) of this section and each statement approved under subsection (f) of this section available for public inspection and copying within 10 days after the agreement or statement is approved. The State commission may charge a reasonable and nondiscriminatory fee to the parties to the agreement or to the party filing the statement to cover the costs of approving and filing such agreement or statement.

(i) Availability to other telecommunications carriers

A local exchange carrier shall make available any interconnection, service, or network element provided under an agreement approved under this section to which it is a party to any other requesting telecommunications carrier upon the same terms and conditions as those provided in the agreement.

(j) "Incumbent local exchange carrier" defined

For purposes of this section, the term "incumbent local exchange carrier" has the meaning provided in section 251(h) of this title.

APPENDIX G

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 07-2469 & 07-2473

MICHIGAN BELL TELEPHONE COMPANY
D/B/A/ AT&T MICHIGAN,
PLAINTIFF-APPELLEE,

v.

COVAD COMMUNICATIONS COMPANY; TALK AMERICA
INC.; XO COMMUNICATIONS SERVICES, INC.,
INTERVENORS-DEFENDANTS – APPELLANTS,

MCLEOD USA TELECOMMUNICATIONS SERVICES, INC.;
TDS METROCOM, LLC,
INTERVENORS,

J. PETER LARK, IN HIS OFFICIAL CAPACITY AS
CHAIRMAN OF THE MICHIGAN PUBLIC SERVICE
COMMISSION AND NOT AS AN INDIVIDUAL; LAURA
CHAPPELLE, IN HER OFFICIAL CAPACITY AS
COMMISSIONER AND NOT AS AN INDIVIDUAL; MONICA
MARTINEZ, IN HER OFFICIAL CAPACITY AS
COMMISSIONER AND NOT AS AN INDIVIDUAL,
DEFENDANTS-APPELLANTS.

BRIEF FOR AMICI CURIAE FEDERAL COMMUNICATIONS COMMISSION IN SUPPORT OF DEFENDANTS-APPELLANTS AND REVERSAL OF THE DISTRICT COURT

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IN THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

NO. 07-2469 & 07-2473

MICHIGAN BELL TELEPHONE COMPANY
D/B/A/ AT&T MICHIGAN,
PLAINTIFF-APPELLEE,

v.

COVAD COMMUNICATIONS COMPANY; TALK AMERICA
INC.; XO COMMUNICATIONS SERVICES, INC.,
INTERVENORS-DEFENDANTS – APPELLANTS,

MCLEOD USA TELECOMMUNICATIONS SERVICES, INC.;
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MARTINEZ, IN HER OFFICIAL CAPACITY AS
COMMISSIONER AND NOT AS AN INDIVIDUAL,
DEFENDANTS-APPELLANTS.

BRIEF FOR AMICI CURIAE FEDERAL COMMUNICATIONS COMMISSION IN SUPPORT OF DEFENDANTS-APPELLANTS AND REVERSAL OF THE DISTRICT COURT

STATEMENT OF INTEREST

Pursuant to this Court's invitation,[1] the Federal Communications Commission ("FCC") respectfully files this brief as *amicus curiae*. The FCC has primary responsibility for implementing and enforcing the Communications Act of 1934, 47 U.S.C. § 151, *et seq*. This case involves this Court's review of a district court's interpretation of section 251(c) of that Act and the FCC orders and rules construing that statutory provision. The FCC has an interest in ensuring that the Act, its rules, and its precedents are correctly interpreted.

In addition, the FCC believes that the district court (in contrast to two circuit courts previously confronting the same issue) improperly disregarded the FCC's authoritative construction of its own rules and authorizing statute. The FCC has an interest in defending its regulatory judgments and in ensuring that they are challenged only in courts with jurisdiction to do so.

QUESTION PRESENTED

Whether an FCC rule relieving incumbent local exchange carriers ("LECs") of their duty under section 251(c)(3) of the Communications Act to make entrance facilities available to competitive carriers as unbundled network elements bars the Michigan Public Service Commission ("MPSC") from construing a different provision of the Act, section 251(c)(2), to require AT&T Michigan, an incumbent LEC, to provide its competitors with similar facilities at cost-based rates when they are used solely for interconnection.

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[1] Letter from Leonard Green, Clerk, U.S. Court of Appeals for the Sixth Circuit to Matthew Berry, General Counsel, FCC (Dec. 10, 2008) ("Green Letter").

STATEMENT OF THE CASE

I. Statutory and Regulatory Background

1. The Telecommunications Act of 1996,[2] which is part of the Communications Act, is designed to "'end[] the longstanding regime of state-sanctioned monopolies' in the local telephone markets"[3] and "to open all telecommunications markets to competition."[4] Congress recognized that no prospective entrant could hope to compete with the incumbent LECs in providing consumers with telephone exchange service and exchange access service by replicating the existing local network infrastructure. Section 251(c), added by the 1996 Act, therefore entitles competitive carriers to enter local telephone markets by utilizing the incumbent LECs' own networks in three distinct but overlapping ways. *See* 47 U.S.C. § 251(c)(2)-(4).

First, section 251(c)(2) requires incumbent LECs "to provide * * * interconnection" between their networks and those of other carriers, and to do so at "just, reasonable, and nondiscriminatory" rates and terms. 47 U.S.C. § 251(c)(2). *See also* 47 C.F.R. § 51.305(a). In simple terms, interconnection in this context means linking the physical networks of two carriers in order to exchange traffic and complete calls between end user customers of the two carriers.[5]

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[2] Pub. Law No. 104-104, 110 Stat. 56 ("1996 Act").

[3] *BellSouth Telecomms., Inc. v. Southeast Tel., Inc.*, 462 F.3d 650, 652 (6th Cir. 2006) (*quoting AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 371 (1999)).

[4] H.R. Rep. No. 104-458, at 1 (1996) (Conf. Rep.). *See AT&T*, 525 U.S. at 371; *Quick Commc'ns, Inc. v. Mich. Bell Tel. Co.*, 515 F.3d 581, 583 (6th Cir. 2008).

[5] 47 C.F.R. § 51.5 (defining the term "interconnection" to refer to the "physical linking of two networks for the mutual

Section 251(c)(2) "obligates the incumbent [LEC] to 'interconnect' the competitor's facilities to its own network to whatever extent is necessary to allow the competitor's facilities to operate."[6]

Second, section 251(c)(3) requires all incumbent LECs to provide their competitors with non-discriminatory access to certain elements of the incumbents' networks on an unbundled basis. 47 U.S.C. § 251(c)(3).[7] In determining which non-proprietary network elements ("UNEs") the incumbent LECs must make available to competitive carriers on an unbundled basis, the FCC must consider whether the failure to provide a requesting competitor access to such elements would "impair" the competitor's ability to provision service. 47 U.S.C. § 25 1 (d)(2)(B).[8] The unbundling obligation enables a competitor to enter the local telephone market by assembling components of a network from various sources—some leased from the incumbent LEC, some perhaps self-provisioned, and some possibly obtained from a third party. This facilitates competition by obviating the need for a new market entrant to build a duplicative and costly stand-alone network.

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exchange of traffic."). *See Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, First Report and Order, 11 FCC Rcd 15499, 15590 (¶ 176) (1996) ("*Local Competition Order*") (subsequent history omitted).

[6] *Verizon Commc'ns, Inc. v. FCC*, 535 U.S. 467, 491 (2002).

[7] *See* 47 U.S.C. § 153(29) (defining a "network element" as "a facility or equipment used in the provision of a telecommunications service").

[8] The statute prescribes a different unbundling standard for so-called "proprietary" network elements, which are not at issue in this case. *See* 47 U.S.C. § 251(d)(2)(A).

Finally, section 251(c)(4) gives potential competitors a right to buy an incumbent LEC's retail services "at wholesale rates" and then to resell them to end users. 47 U.S.C. § 251(c)(4).[9]

Section 252 establishes the procedures that incumbent LECs and their competitors must follow when implementing the substantive rights and obligations of section 251(c). 47 U.S.C. § 252. Section 252 provides that the parties enter into negotiated contracts—known as interconnection agreements—for interconnection, resale of services, or network elements, followed by expeditious arbitration by state public utility commissions of any unresolved issues. *Id.*[10] Section 252(c)(1) requires state arbitrators to conform their disposition of "open issues" in interconnection agreements to "the requirements of section 251, including the regulations prescribed by the [FCC] pursuant to section 251." 47 U.S.C. § 252(c)(1). All interconnection agreements approved or arbitrated by state commissions are subject to review in federal district court to determine whether they "meet[] the requirements" of sections 251 and 252. 47 U.S.C. § 252(e)(4), (6).[11]

Section 252(d)(1) requires the rates both for interconnection under section 251(c)(2) and for UNEs under section 251(c)(3) to be cost-based. 47 U.S.C.

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[9] *See Mich. Bell Tel. Co. v. MCIMetro Access Transmission Servs.*, 323 F.3d 348 (6th Cir. 2003); *Mich. Bell Tel. Co. v. Strand*, 305 F.3d 580 (6th Cir. 2002). Section 251(c)(4) is not at issue in this case.

[10] Congress directed the FCC to resolve such disputes whenever a state commission opts out of its statutory role. *See* 47 U.S.C. § 252(e)(5).

[11] *See Mich. Bell Tel. Co. v. MFS Intelenet of Mich., Inc.*, 339 F.3d 428, 431 (6th Cir. 2003).

§ 252(d)(1). The FCC's rules require those cost-based rates to be calculated under a Total Element Long-Run Incremental Cost ("TELRIC") methodology. *See* 47 C.F.R. § 51.505(b). The Supreme Court has upheld the TELRIC methodology as lawful and consistent with the statute.[12]

2. Under authority delegated by Congress, *see* 47 U.S.C. § 251(d)(2), the FCC has adopted rules establishing which network elements should be unbundled and made available to competitive carriers pursuant to section 251(c)(3). *See* 47 C.F.R. § 51.319. In its 2005 Triennial Review Remand Order ("*TRRO*")[13] revisiting the list of mandatory UNEs, the FCC considered whether so-called "entrance facilities"—the facilities at issue in this case—must be offered on an unbundled basis under section 251(c)(3). Entrance facilities are "the transmission facilities that connect competitive LEC networks with incumbent LEC networks."[14] Entrance facilities can be used for multiple purposes. For example, entrance facilities may be used simply to link two carriers' networks for the purpose of exchanging traffic (*i.e.*, interconnection). A competitive carrier may also use entrance facilities, however, to carry its own customers' traffic from an incumbent LEC's central office to the

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[12] *Verizon*, 535 U.S. 467.

[13] *Unbundled Access to Network Elements and Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Order on Remand, 20 FCC Rcd 2533, 26109-10 (¶ 136) (2005) ("*TRRO*") (subsequent history omitted).

[14] *TRRO*, 20 FCC Rcd at 2609 (¶ 136). *See Ill. Bell Tel. Co. v. Box*, 526 F.3d 1069, 1071 (7th Cir. 2008) (describing "entrance facilities" as "connection[s] between a switch maintained by an ILEC and a switch maintained by a CLEC.").

competitive carrier's switch or other equipment, a practice known as "backhauling."[15]

The FCC in the *TRRO* determined that competitive carriers are not impaired in their ability to provide service without access to entrance facilities as unbundled network elements.[16] Accordingly, the FCC adopted an implementing rule specifying that an incumbent LEC is not obligated to provide a competitive carrier with access to entrance facilities on an unbundled basis at cost-based (*i.e.*, TELRIC) rates under section 251(c)(3). 47 C.F.R. § 51.319(e)(2)(i). As it made this change, however, the FCC emphasized that its non-impairment finding "with respect to entrance facilities does not alter the right of competitive LECs to obtain interconnection facilities pursuant to section 251(c)(2)."[17] The FCC explained that "competitive LECs will have access to these facilities at cost-based rates to the extent that they require them to interconnect with the incumbent LEC's network."[18]

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[15] *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, 18 FCC Rcd 16978, 17203, 17206-07 (¶¶ 365, 370) (2003) ("*TRO*") (subsequent history omitted). *See Southwestern Bell Tel. L.P. v. Mo. Pub. Serv. Com'n*, 530 F.3d 676, 681-83 (8th Cir. 2008), *cert. denied*, 129 S.Ct. 971 (2009).

[16] *TRRO*, 20 FCC Rcd at 2611 (¶¶ 137-39).

[17] *Id.* at 2611 (¶ 140).

[18] *Id.*

II. Background of This Proceeding

1. Shortly after the FCC issued the *TRRO*, AT&T Michigan[19] notified competitive LECs that it would modify its interconnection agreements so as to eliminate entirely its obligation to provide entrance facilities at cost-based, TELRIC rates. A number of competitive LECs asked the MPSC to prohibit this modification on the ground that it improperly abrogated their right to cost-based interconnection under section 251(c)(2).[20] On September 20, 2005, the MPSC arbitrated the dispute in favor of the competitive LECs.[21] Based upon the FCC's finding in paragraph 140 in the *TRRO*, the MPSC determined that "[competitive] LECs still have a right to entrance facilities to the extent required for interconnection pursuant to [s]ection 251(c)(2)."[22] The MPSC determined that AT&T Michigan's proposal "would eliminate any responsibility to provide those facilities at TELRIC rates, contrary to the FCC's specific findings."[23]

2. On April 28, 2006, AT&T Michigan filed a complaint in federal district court challenging the MPSC's ruling,[24] and on September 26, 2007, the

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[19] At the time the dispute arose, AT&T Michigan was doing business as SBC Michigan Bell. To avoid confusion, the FCC throughout this brief refers to this company as AT&T Michigan.

[20] Record Entry No. 1, MPSC Order, Case No. U-14447 at 11-13 (Sept. 20, 2005) (J.A. 40-42).

[21] *Id.* at 13 (J.A. 42).

[22] *Id.* (*citing TRRO*, 20 FCC Rcd at 2611 (¶ 140)) (J.A. 42).

[23] *Id.*

[24] Record Entry No. 1, Complaint for Declaratory, Injunctive, and Other Relief of Plaintiff at 19, filed by AT&T Michigan (Apr. 28, 2006) (J.A. 26).

district court set it aside.[25] The district court believed that the *TRRO* broadly "provides that entrance facilities need not be provided by incumbent carriers to competing carriers on an unbundled basis."[26] The district court determined that the MPSC decision was inconsistent with that rule. The court acknowledged that the FCC in paragraph 140 of the *TRRO* had said that its unbundling determination did not alter incumbent LECs' ongoing interconnection obligation to provide entrance facilities at cost-based rates but asserted that "[i]t is not reasonable to interpret an explanatory comment, such as the one found in ¶ 140 of the *TRRO*, in a manner that undermines the plain meaning of the rule."[27]

3. The MPSC and several competitive LECs appealed the district court's decision to this Court. This Court held argument on December 10, 2008. On the day of oral argument, the Court by letter invited the FCC to file a brief setting forth its views on the cases and how they should be resolved.[28]

ARGUMENT:

THE DISTRICT COURT ERRED IN HOLDING THAT THE RULE REMOVING AN INCUMBENT LEC'S DUTY TO PROVIDE ENTRANCE FACILITIES AS UNES ALSO RELIEVES AN INCUMBENT LEC OF ITS SEPARATE DUTY TO PROVIDE INTERCONNECTION.

At the outset, it is important to emphasize that incumbent LECs have two independent duties under section 251(c) that are relevant to this case. First, under the "unbundling" duty of section 251(c)(3), if the FCC makes an "impairment" finding, an incumbent LEC must offer a particular element of its network to a competitor at cost-based rates. Separately, under the "interconnection" duty of section 251(c)(2), an incumbent LEC must agree to interconnect its network with a competitor's network at cost-based rates at any technically feasible point of the competitor's choosing. *See AT&T*, 525 U.S. at 371 (specifying the separate ways in which section 251(c) obligates incumbent LECs to provide access to their networks).

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[25] Record Entry No. 32, District Court Order (Sept. 26, 2007) (J.A. 292-314).

[26] *Id.* at 14 (J.A. 305).

[27] *Id.*

[28] Green Letter, *supra*, note 1.

The question presented by this case is whether the FCC's decision to remove the unbundling duty automatically relieves an incumbent LEC of its separate duty to provide interconnection to competitive carriers with regard to a type of facility that has multiple uses, one of which was addressed in the unbundling decision. As shown below, the FCC answered that question in the negative in the *TRRO*, and that determination is not subject to collateral attack in this proceeding. Even if the FCC's statement on-point in the *TRRO* were reviewable here, it should still control the outcome because (1) the FCC's considered construction of the scope of its own unbundling rule is clearly correct; and (2) even if there were some reason for doubt, its reasonable interpretation of section 251(c)(2) should be accorded deference by the Court.

I. THE *TRRO* IS NOT SUBJECT TO COLLATERAL ATTACK IN THIS CASE.

The FCC in paragraph 140 of the *TRRO* declared explicitly that its rule relieving incumbent LECs of the duty to unbundle entrance facilities and its non-impairment finding "do[] not alter the right of competitive LECs to obtain interconnection facilities pursuant to section 251(c)(2)."[29] The FCC went on to state categorically that "competitive LECs will have access to these facilities at cost-based rates to the extent that they require them to interconnect with the incumbent LEC's network."[30] The MPSC was correct in accepting the agency's authoritative interpretation of the scope of the unbundling rule and its specification of the incumbent LECs' section 251(c)(2) obligations.[31] The district court purported to reject the FCC's ruling,[32] but it had no authority to do so.

Challenges to orders of the FCC are governed by section 402 of the Communications Act of 1934, which states that "*any proceeding* to enjoin, set aside, annul, or suspend *any order* of the [FCC] under this chapter . . . *shall be brought as provided by and in the manner prescribed* in Chapter 158 of title 28, United States Code." 47 U.S.C. § 402(a) (emphasis added). Chapter 158, which is known as the Hobbs Act and is codified at 28 U.S.C. §§ 2341 *et seq.*, provides in relevant part that "[t]he court of appeals . . . has exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of all final orders of the Federal Communications Commission made reviewable by [47 U.S.C. § 402(a)]." 28 U.S.C.

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[29] *TRRO*, 20 FCC Rcd at 2611 (¶ 140).

[30] *Id.*

[31] Record Entry No. 1, MPSC Order at 13 (J.A. 42).

[32] Record Entry No. 32, District Court Order at 14 (Sept. 26, 2007) (J.A. 305). The FCC's statement in paragraph 140 was not a mere "explanatory comment" without legal force, as the district court apparently believed. Instead, it constituted an authoritative interpretation of the meaning of the FCC's unbundling rules and a description of the incumbent LECs' interconnection obligations with respect to these facilities.

§ 2342(1). The statute specifies that "any party aggrieved by the [FCC's] final order may, *within 60 days after its entry*, file a petition to review the order in the court of appeals wherein venue lies." 28 U.S.C. § 2344 (emphasis added).

The Communications Act and the Hobbs Act thus specify the precise procedure for obtaining judicial review of FCC orders and vest exclusive jurisdiction in the courts of appeals considering petitions for review. "'[A] statute which vests jurisdiction in a particular court cuts off original jurisdiction in other courts in all cases covered by that statute.'"[33] The "appropriate procedure for obtaining judicial review of the agency's disposition of [regulatory] issues [is] to appeal to the Court of Appeals *as provided by statute*."[34] This general rule applies when, as here, a district court is reviewing a state public utility commission decision under section 252(e)(6). In such cases, the district court is obligated to accept the FCC's previous resolution of any contested question.[35]

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[33] *Browning v. Levy*, 283 F.3d 761, 778 (6th Cir. 2002) (*quoting Telecomms. Research and Action Ctr. v. FCC*, 750 F.2d 70, 77 (D.C. Cir. 1984)). *See Thiokol Corp. v. Dep't of Treasury, State of Mich., Revenue Div.*, 987 F.2d 376, 379 (6th Cir. 1993); *Greater Detroit Res. Recovery Authority v. EPA*, 916 F.2d 317, 321 (6th Cir. 1990).

[34] *FCC v. ITT World Commc'ns, Inc.*, 466 U.S. 463, 468 (1984) (emphasis added).

[35] *See Qwest Corp. v. Pub. Utils. Comm'n of Colorado*, 479 F.3d 1184, 1192 n.6 (10th Cir. 2007) ("The parties have not contested the validity of this FCC interpretation, nor could they. *See* 28 U.S.C. § 2342."); *see also Vonage Holdings Corp. v. Minn. PUC*, 394 F.3d 568, 569 (8th Cir. 2004) ("[n]o collateral attacks on the FCC order are permitted" in private party litigation); *Wilson v. A.H. Belo Corp.*, 87 F.3d 393, 396-397 (9th Cir. 1996); *Telecomms. Research & Action Ctr.*, 750 F.2d at 75; *George*

If AT&T Michigan wanted to challenge the FCC's authoritative interpretation of its own unbundling regulations in the *TRRO*, its recourse was to raise this claim in a petition for review of that order within 60 days after its entry.[36] In fact, AT&T's predecessor SBC (and many others) did challenge the *TRRO* in this manner, but it failed to assert this claim.[37] The FCC's ruling in paragraph 140 of the TRRO thus has become final and is not subject to judicial review in this proceeding.

II. THE COURT IN ANY EVENT SHOULD DEFER TO THE FCC'S REASONABLE INTERPRETATION OF THE UNBUNDLING RULE AND SECTION 251(c)(2).

A. The FCC's Construction of the Scope of Its Own Unbundling Rule Is Controlling.

Under well-established law, an "agency's reading of its own rule is entitled to substantial deference."[38] Indeed, an agency's construction of its own rule is "'controlling'" when, as in this case, "the interpretation reflect[s] a 'fair and considered judgment' and

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Kabeller, Inc. v. Busey, 999 F.2d 1417, 1421-22 (11th Cir. 1993); *Bywater Neighborhood Ass'n v. Tricarico*, 879 F.2d 165, 167 (5th Cir. 1989), *cert. denied*, 494 U.S. 1004 (1990); *City of Peoria v. Gen. Elec. Cablevision Corp.*, 690 F.2d 116, 119 (7th Cir. 1982) (describing challenge to FCC rule in private party district court litigation as having been "brought in the wrong court at the wrong time against the wrong party").

[36] To the extent AT&T believed the FCC's statement in paragraph 140 was not clear, it could have filed a petition for reconsideration asking the agency to clarify it.

[37] *See Covad Commc'ns, Inc. v. FCC*, 450 F.3d 528 (D.C. Cir. 2006).

[38] *Riegel v. Medtronic, Inc.*, 128 S.Ct. 999, 1010 (2008).

[is] not 'plainly erroneous or inconsistent with the regulation.'"[39] Thus, even assuming, arguendo, that the district court were not precluded from reviewing the FCC's definitive determination in its *TRRO* as to the scope of its unbundling rule, the district court should have deferred to it.[40]

Section 251(c)(2) and 251(c)(3) are independent statutory obligations that serve different purposes. The cost-based UNEs that incumbent LECs must provide under section 251(c)(3) are designed to enable competitive carriers to assemble their own telecommunications networks by combining elements from various sources (including the incumbent LECs), whereas the interconnection that the incumbent LEC must provide under section 251(c)(2) simply enables a competitive carrier to connect its network with the network of the incumbent LEC to exchange traffic and complete calls.[41] The FCC thus reasonably determined in the *TRRO* both that competitive LECs are not impaired without access to entrance facilities (thus relieving them of the obligation to provide those facilities to competitive carriers as UNEs under section 251(c)(3)) and that this determination had no effect on the incumbent LECs' independent obligation to provide interconnection under section 251(c)(2).[42] Because that regulatory interpretation "reflect[s] a 'fair and considered judgment' and [is] not 'plainly erroneous or inconsistent'" with the unbundling rule, that construction is "'controlling.'"[43]

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[39] *Huffman v. C.I.R.*, 518 F.3d 357, 367-68 (6th Cir. 2008) (*quoting Auer v. Robbins*, 519 U.S. 452, 461-62 (1997)).

[40] *See MCI Telecommns. Corp. v. Ohio Bell Tel. Co.*, 376 F.3d 539, 550 (6th Cir. 2004) (according deference to the agency's own construction of an FCC rule).

[41] *See Local Competition Order*, 11 FCC Rcd at 15636-37 (¶ 270) ("Subsection (c)(3), therefore, allows unbundled elements to be used for a broader range of services than subsection (c)(2) allows for interconnection.").

The district court erroneously found that the agency's interpretation of the scope of its unbundling regulation "undermines the plain meaning of the rule."[44] The rule referenced by the court (which states that incumbent LECs need not provide entrance facilities as unbundled network elements) is codified in a section addressing an incumbent LEC's duties "in accordance with section 251(c)(3) of the Act." 47 C.F.R. § 51.319(e). Nothing in that rule suggests that it applies also to an incumbent LEC's separate obligation (embodied in a different rule, 47 C.F.R. § 51.305) to provide interconnection under section 251(c)(2). The FCC's statement in paragraph 140 recognized something that the district court appears to have overlooked: these are two separate statutory obligations that are not necessarily co-extensive.

Nor is the FCC's interpretation inconsistent with the non-impairment determination set forth in the *TRRO*. Section 251(d)(2) affirmatively required the FCC to make an impairment determination in analyzing whether entrance facilities (or other network elements) should be classified as UNEs that an incumbent LEC must provide at cost-based rates under section 251(c)(3). *See* 47 U.S.C. § 251(d)(2). In contrast, the statute does not direct the FCC to analyze impairment in determining an incumbent LEC's interconnection duty under section 251(c)(2). So a finding of impairment or non-impairment under section 251(c)(3) is not relevant to the separate question of whether there is an ongoing interconnection obligation under section 251(c)(2).

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[42] *See Southwestern Bell*, 530 F.3d at 683-84 (holding that FCC rule eliminating the requirement that incumbent LECs provide entrance facilities as UNEs under section 251(c)(3) does not affect the incumbent LECs' continuing duty to offer such facilities at cost-based rates when used for interconnection facilities under section 251(c)(2)); *Ill. Bell*, 526 F.3d at 1071-72 (same).

[43] *Huffman*, 518 F.3d at 367-68 (*quoting Auer*, 519 U.S. at 461-62).

[44] Record Entry No. 32, District Court Order at 14 (J.A. 305).

As a factual matter, AT&T Michigan is mistaken in arguing that the MPSC ruling "circumvents [the FCC's] rule by re-imposing the repealed requirement under a different provision of the 1996 Act."[45] The FCC recognized that competitive LECs may use particular transmission facilities both as a means of interconnection, *i.e.*, a link for the mutual exchange of traffic between an incumbent LEC and a competitive LEC, and to backhaul traffic, *i.e.*, to carry its own customers' traffic from an incumbent LEC central office to the competitive carrier's switch or other equipment.[46] In its 1996 Local Competition Order, the FCC interpreted section 251(c)(2) to require an incumbent LEC to provide interconnection facilities at cost-based rates.[47] Both the *TRO* and *TRRO* made clear that those section 251(c)(2) interconnection obligations continue despite the elimination of section 251(c)(3) unbundling obligations for entrance facilities.[48]

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[45] Br. of AT&T Michigan at 17.

[46] *TRO*, 18 FCC Rcd at 17203 (¶ 365).

[47] *See Local Competition Order*, 11 FCC Rcd at 15605, 15781 (¶¶ 198, 202, 533).

[48] *See TRO*, 18 FCC Rcd at 17203-04 (¶ 366); *TRRO*, 20 FCC Rcd at 2611 (¶ 140).

A competitor thus continues to have cost-based access to incumbent interconnection facilities in order to exchange traffic between its customers and those of the incumbent LEC. The incumbent LEC, however, no longer has to provide such facilities at cost-based rates to a competitive carrier that procures the facility to back-haul traffic between the competitor's own customers.[49] The decision to no longer require unbundled access to entrance facilities under section 251(c)(3) thus has a material impact notwithstanding the remaining, narrower obligation to provide those facilities for purposes of interconnection.

B. The Court Should Defer to the FCC's Determination that an Incumbent LEC's Duty to Provide Interconnection under Section 251(c)(2) May Require the Carrier to Offer Cost-based Interconnection Facilities.

Unless Congress unambiguously has expressed an intent on the precise question at issue, a court must give deference to the expert agency's construction of a statute that it administers.[50] Congress did not speak directly to whether an incumbent LEC's duty to provide interconnection under section 251(c)(2) could include the provision of entrance facilities used to link its network with those of a competitive carrier. By leaving the term "interconnection" undefined in section 251(c)(2) and not otherwise delineating its meaning, Congress delegated authority to the FCC to interpret the scope of an incumbent LEC's interconnection obligation in a permissible fashion.[51]

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[49] *See Southwestern Bell*, 530 F.3d at 681; *Ill. Bell*, 526 F.3d at 1071.

[50] *Chevron USA Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 842-43 (1984).

As noted above, section 251(c)(2) requires incumbent LECs "to provide * * * interconnection" to a requesting competitive LEC "at any technically feasible point within the carrier's network." 47 U.S.C. § 251(c)(2). AT&T Michigan misreads that language as imposing only a passive duty on the incumbent LEC to "to allow the CLEC to connect 'with' the incumbent LEC's network to 'accommodate interconnection,'"[52] but that is plainly not what it says, or how the FCC has interpreted it. Since the adoption of the 1996 Act, the FCC has consistently found that an incumbent LEC, to fulfill that duty to interconnect, may be required to provide facilities that are used for the physical linking of the two networks. For example, in its *Local Competition Order*, the FCC stated that the right of a competitive LEC to obtain interconnection at any technically feasible point may require "novel use of," and "modifications to" an incumbent LEC's facilities, pointing out that the competitive LEC would pay the cost, "including a reasonable profit."[53] Indeed, the *Local Competition Order* and the implementing rule it adopted require the incumbent LEC to provide interconnection not just at any feasible point, but by "any feasible method" of interconnection, such as a "meet point arrangement" by which the incumbent LEC must build out its facilities to a designated "meet point."[54] As the FCC explained: "Congress intended to obligate the incumbent to accommodate the new entrant's network architecture by requiring the incumbent to provide interconnection "for the facilities and equipment" of the new entrant.[55]

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[51] *Chevron*, 467 U.S. at 843; *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet*, 545 U.S. 967, 980 (2005). *See* 47 U.S.C. § 251(d)(1) (directing the FCC to establish regulations to implement section 251); *AT&T*, 525 U.S. at 397 (Congress intended the FCC to resolve the ambiguities in the 1996 Act).

[52] AT&T Michigan Br. at 29.

[53] *Local Competition Order*, 11 FCC Rcd at 15605 (¶¶ 198, 202).

In its *TRO*, the FCC reiterated its view that there are "facilities that incumbent LECs explicitly must make available for section 251(c)(2) interconnection."[56] Thus, the FCC stated, "to the extent that requesting carriers need facilities in order to 'interconnect[] with the [incumbent LEC's] network,' section 251(c)(2) of the Act expressly provides for this."[57] *See also* 47 C.F.R. § 51.305(f) (FCC rule implementing section 251(c)(2) requires, where feasible, an incumbent LEC to provide two-way trunking facilities to a requesting competitive LEC).[58]

The FCC in its discussion of entrance facilities in its *TRRO* made clear that it was not altering the rights and duties under section 251(c)(2) with respect to facilities that are used for interconnection.[59] Section 251(c)(2) entitles competitive LECs "access to these facilities at cost-based rates to the extent that they require them to interconnect with the incumbent LEC's network."[80] Although the FCC did not specifically define what it meant by the term "interconnection facilities," the MPSC's interpretation of that term to include entrance facilities when used for interconnection is fully consistent with the FCC's finding in the *TRRO*. The district court thus was wrong to overturn the MPSC's decision on this point.

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[54] *Id.* at 15781 (¶ 553); 47 C.F.R. § 51.321(a), (b).

[55] *Id.* at 15605 (¶ 202).

[56] *TRO*, 18 FCC Rcd at 17203 (¶ 365).

[57] *Id.* at 17204 (¶ 366).

[58] *See also Application by SBC Communications Inc., Southwestern Bell Telephone Co., and Southwestern Bell Communications Service, Inc. d/b/a Southwestern Bell Long Distance*, Memorandum Opinion and Order, 15 FCC Rcd 18354, 18391 (¶ 80) (2000) ("Interconnection trunking . . . and meet-point arrangements are among the technically feasible methods of interconnection.").

[59] *TRRO*, 20 FCC Rcd at 2611 (¶ 140).

AT&T Michigan and its supporting *amici* argue that the plain language of section 251(c)(2) prohibits the FCC from interpreting that subsection to require an incumbent LEC to provide facilities used for the physical linking of its network with the network of a competitive carrier. Because an incumbent LEC must provide interconnection with its network "for the facilities and equipment of any requesting telecommunications carrier," 47 U.S.C. § 251(c)(2), these carriers claim that an incumbent LEC's duty to provide interconnection cannot reasonably be read to encompass a requirement to provide facilities necessary to link its network with the competitive carrier. That argument is unavailing for several reasons.

First, the statutory interpretation advanced by AT&T Michigan and the supporting *amici* is flatly inconsistent with prior FCC interpretations (described above) regarding the scope of the interconnection obligation and provision of facilities to achieve such interconnection, which were expressly left unaltered in the ruling issued by the FCC in the *TRRO*. As demonstrated at pages 10-13, the validity of the FCC's statutory interpretation in the *TRRO* (and the other prior interconnection and unbundling decisions) is not subject to collateral challenge in this case. The Court therefore should not engage in a review of the FCC's determinations nor entertain AT&T Michigan's contrary interpretation.

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[80] *Id.*

If the Court nonetheless does inquire into the scope of interconnection under section 251(c)(2), it should defer to the FCC's reasonable and consistent construction and reject AT&T Michigan's flawed interpretation. The language relied on by AT&T Michigan and the supporting *amici* states only that the interconnection that an incumbent LEC must provide under section 251(c)(2)—whatever that may be—is "for the facilities and equipment of" the competitive carrier. That language does not delineate what an incumbent LEC must do in order to provide interconnection "for the facilities and equipment of" the competitive carrier, let alone establish unambiguously that an incumbent LEC's duty to provide interconnection does not include the provision of facilities that are necessary to achieve that interconnection.

Moreover, the "plain language" construction advanced by AT&T Michigan and its supporting *amici* is inconsistent with established administrative and judicial precedent. As noted above, the FCC consistently has stated that an incumbent LEC, in fulfilling its duty to provide interconnection under section 251(c)(2), may be required to provide facilities to effectuate interconnection, and that those obligations continue notwithstanding the FCC's elimination of entrance facilities as an unbundled network element under section 251(c)(3).[61] And both the Seventh and Eighth Circuits have ruled expressly that section

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[61] *TRRO*, 20 FCC Rcd at 2611 (¶ 140).

251(c)(2) entitles competitive carriers access to entrance facilities at cost-based rates for purposes of interconnecting with the incumbent LEC's network.[62]

Indeed, the agency charged with administering the Communications Act and every single federal appellate judge addressing the issue has construed section 251(c)(2) directly contrary to AT&T Michigan's alleged "plain meaning" construction. Given this, and especially in light of the deference courts with jurisdiction afford the FCC in construing the Communications Act[63] and its regulations,[64] the Court should reject AT&T Michigan's flawed interpretation.

CONCLUSION

The Court should reverse.

Respectfully submitted,

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April 3, 2009

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[62] *Southwestern Bell*, 530 F.3d 676; *Ill. Bell*, 526 F.3d 1069.

[63] *Chevron*, 467 U.S. at 844.

[64] *Riegel*, 128 S.Ct. at 1010.

IN THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

[Filed: 04/03/2009]

NOS. 07-2469 & 07-2473

MICHIGAN BELL TELEPHONE COMPANY D/B/A
AT&T MICHIGAN,
PLAINTIFF-APPELLEE,

v.

J. PETER LARK, IN HIS OFFICIAL CAPACITY
ASCHAIRMAN OF THE MICHIGAN PUBLIC SERVICE
COMMISSION AND NOT AS AN INDIVIDUAL; *ET AL*.
DEFENDANTS-APPELLANTS.

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type volume limitation in Fed. R. App. P. 32(a)(7)(B) and Fed. R. App. P. 29(d) because this brief contains 5454 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), as calculated by Microsoft Word 2003.

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April 3, 2009

APPENDIX H

UNITED STATES DISTRICT COURT,
E.D. MICHIGAN,
SOUTHERN DIVISION.

No. 06-11982.

MICHIGAN BELL TELEPHONE COMPANY,
d/b/a AT & T Michigan,
Plaintiff,

v.

J. PETER LARK, LAURA CHAPPELLE, AND MONICA MARTINEZ, in their official capacities as commissioners of the Michigan Public Service Commissions and not as individuals,
Defendants,

and

COVAD COMMUNICATIONS COMPANY, MCLEODUSA TELECOMMUNICATIONS SERVICES, INC., TALK AMERICA, INC., TDS METROCOM, L.L.C., AND XO COMMUNICATIONS SERVICES, INC.,
Defendant-Intervenors.

Sept. 26, 2007.

ORDER

JULIAN ABELE COOK, JR., United States District Court Judge.

This case is an appeal by the Plaintiff, Michigan Bell Telephone Company, doing business as AT & T Michigan, from an "Opinion and Order" that had been issued by the Michigan Public Service Commission ("MPSC") on September 20, 2005. These issues, about which the parties have differences of opinion, were addressed in their respective motions for summary judgment. For the reasons that have been set forth below, the Court will grant in part the parties' respective applications for relief.

I.

On April 28, 2006, AT & T Michigan filed this lawsuit, contending that the Defendants, in their official capacities as commissioners of the MPSC, had issued an "Opinion and Order" on September 20, 2005[1] which is legally preempted by the Telecommunications Act of 1996. On May of the same year, five entities (namely, Covad Communications Company, McLeod USA Telecommunications Services, Inc., Talk America, Inc., TDS Metrocom, L.L.C., and XO Communications Services, Inc.) filed motions to intervene in the litigation, all of which were granted by the Court. Several months later (January 26, 2007), AT & T Michigan filed a motion for a summary judgment, seeking to obtain the entry of an order that would (1) permanently preclude the MPSC from enforcing the unbundling and cost-based pricing requirements that had been mandated by the MPSC in its September Order; (2) require a "true-up" of the transitional rates that had been issued by this state public service utility commission; and (3) direct the MPSC to establish appropriate rates for routine network modifications. On the same date, Covad Communications Company et al (called "Defendant-Intervenors" hereinafter) filed a cross-motion for summary judgment, in which they collectively asked the Court to uphold the validity of the now-challenged September Order.[2]

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[1] For purposes of simplicity, this MPSC "Opinion and Order" will be identified as the "September Order."

II.

Initially, the Court determines that there are no genuine issues of a material fact which must be explored prior to its examination of the legal issues that have been raised by the parties in their respective motions. Fed.R.Civ.P. 56. Hence, the Court will now turn to other relevant matters that the parties have submitted for review.

Section 252 of the Telecommunications Act of 1996, 47 U.S.C. Sec. 252(e)(6), contains the following language:

> In any case in which a State commission makes a determination under this section [252], any party aggrieved by such determination may bring an action in an appropriate Federal district court to determine whether the agreement or statement meets the requirements of section 251 and this section [252].

In 2002, the Sixth Circuit Court of Appeals reaffirmed the authority of the federal courts to conduct a *de novo* review of an order from a state public utility commission to determine if it is in compliance with the requirements of the 1996 Act without giving deference to the commissioners' interpretation of this statute. *Michigan Bell Tel. Co. v. Strand*, 305 F.3d 580, 586 (6th Cir.2002). Moreover, a decision by a state public utility commission can be sustained only on those grounds that have been set forth within its orders. As such, a "reviewing court may not supply a reasoned basis for the agency's action that the agency itself has not given." *Bangura v. Hanson*, 434 F.3d 487, 502 (6th Cir.2006).

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[2] A brief in opposition to the AT & T Michigan motion was also filed by the MPSC.

On the other hand, the Sixth Circuit has declared that "[a]s for the MPSC's findings of fact made in the course of exercising its enforcement authority, we join our sister circuits in applying the 'arbitrary and capricious' standard." *Strand*, 305 F.d3d at 586. This arbitrary and capricious standard is the least demanding form of judicial review of an administrative action. Thus, the *Strand* court advised the district courts that when it is possible to offer a reasoned explanation for a particular outcome on the basis of the existing evidence, it is neither arbitrary nor capricious. *Id.* at 587.

III.

Historically, local telephone service was provided by state-regulated monopolies, each with its own distinct service territory. The rates and duties of such companies were regulated by the public utility commissions in each state. In the early 1990s, Michigan and other states undertook steps to introduce competition into the local market. However, these efforts were largely unsuccessful and competition in local markets remained practically nonexistent for an extended period of time. For this reason and to avoid patchwork regulation among the states, Congress passed the Telecommunications Act of 1996 ("1996 Act"), codified at 47 U.S.C. § 152 *et seq.*

The 1996 Act established a "pro-competitive, deregulatory national policy framework" that was "designed to accelerate [the deployment of new technology and services and to] open . . . all telecommunications markets to competition." H.R. Conf. Rep. No. 104-4568, at 1. Indeed, the *Sixth Circuit Court in Michigan Bell Telephone Co. v. MCIMetro Access Transition Services, Inc.*, 323 F.3d 348, 352 (6th Cir.2002), explained that:

> [The 1996 Act] has been called one of the most ambitious regulating programs operating under "cooperative federalism," and creates a regulatory framework that gives authority to state and federal entities in fostering competition in local telephone markets. We have often reiterated the Act's purposes, which are ending local telephone monopolies and promoting competition in local telephone markets.

The objective of the 1996 Act was to ensure that "local service, which was previously operated as a monopoly overseen by the several states, be opened to competition according to standards established by federal law." *MCI Telecom. Corp. v. Bell Atl-Pa.*, 271 F.3d 491, 497 (3rd Cir.2001). This legislative enactment preempted all previously existing state laws that had restricted local competition, including the exclusive franchises which had been granted to incumbent local telephone service carriers by the various state public utility commissions.[3] However, Congress, in recognizing the existence of the practical hurdles to competition posed by requiring competitors to build duplicative stand-alone networks, concluded that the elimination of the historical legal barriers to competition was not enough to guarantee its development in the local markets. Thus, the 1996 Act represented a congressional effort to address this problem by requiring incumbent local telephone service carriers to open their networks to competing local carriers.[4]

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[3] The phrase, "incumbent local ex-change carrier," refers to those telephone companies, such as AT & T Michigan, that had held monopolies in local markets prior to the passage of the 1996 Act.

To this end, the 1996 Act imposed several duties upon every incumbent carrier. As an example, each incumbent carrier was directed to negotiate or arbitrate agreements with competing local carriers by offering one of three methods of competition; namely, (1) provide an interconnection to its network to a competing carrier that builds or has it own networks, 47 U.S.C. § 251(c)(2); (2) enable a competing carrier that desires to lease all or a part of the incumbent's network-as opposed to building its own-with access to its network elements on an "unbundled basis," 47 U.S.C. § 251(c)(3); or (3) sell its services at wholesale prices to a competing carrier that will resell them at retail prices, 47 U.S.C. § 251(c)(4).

This legislation also directed the Federal Communications Commission ("FCC") to create implementing regulations, while giving oversight responsibilities of the "interconnection agreements" to state public utility commissions. More importantly, the 1996 Act gave the task of determining which network elements must be shared or unbundled by incumbent carriers to the FCC. The language within 47 U.S.C. § 251(d)(2) provides that when determining "what network elements should be made available" for unbundling, the FCC "shall consider, at a minimum, whether-(A) access to such network elements as are proprietary in nature is necessary; and (B) the failure to provide access to such network elements would impair the ability of" the competing carrier to offer its services. 47 U.S.C. § 251(d)(2).

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[4] The phrase, "competing local carrier," is the identification of a new entrant into the deregulated market. Here, the Defendant-Intervenors satisfy this definition for the purpose of this litigation.

The unbundling requirement, as well as the FCC's interpretation of the elements that incumbent carriers must share with every competing local carrier, has evolved and been the subject of continuing litigation over the years. In 1996, the FCC issued its *First Report and Order*,[5] which was immediately challenged by incumbent carriers. In 1999, the Supreme Court determined that some of the provisions within this *First Report and Order* were unlawful, and instructed the FCC to revise its regulations. *AT & T Michigan Corp. v. Iowa Utilities Bd.*, 525 U.S. 366, 119 S.Ct. 721, 142 L.Ed.2d 835 (1999). As directed, new regulations were issued by the FCC in November 1999 in its *UNE Remand Order*.[6] However, the D.C. Circuit Court of Appeals rendered a decision on May 24, 2002 which held that some of these revised regulations were unlawful. *United States Telecom Ass'n v. FCC*, 290 F.3d 415 (2002)[7]. Thereafter, the FCC responded by issuing its *Triennial Review Order* ("TRO") on August 21, 2003, which contained a new set of regulations.[8] An appeal followed. The D.C. Circuit Court of Appeals vacated several portions of the *TRO* regulations in *United States Telecom Ass'n v. FCC*, 359 F.3d 554 (2004).[9] In February 2005, the FCC issued a new set of unbundling rules in the *Triennial Review Remand Order* ("TRRO")[10] which were subsequently affirmed on appeal. *Covad Comms. Co. v. FCC*, 450 F.3d 528 (D.C.Cir.2006).

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[5] *In re Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCCR 15499 (1996).

[6] *In re Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 15 FCCR 3696 (1999).

[7] This case is identified as "*USTA I*."

[8] *In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 18 FCCR 19020 (2003).

The Congress, in its passage of the 1996 Act, also assigned specific responsibilities to the state public utility commissions. Section 252 of this statute establishes the procedural framework by which competing carriers may enter into contracts, called "interconnection agreements," with incumbents to fulfill the obligations that are found in subsections 251(b) and 251(c), including the duty to provide unbundled access to certain network elements, as required by 251(c)(3). The 1996 Act also (1) requires incumbent carriers to negotiate these agreements upon request, and (2) provides for the assignment of a regulatory review of interconnection agreements to state public utility commissions. However, if these negotiations do not produce an agreement, either party to the process may petition the state public utility commission to arbitrate the unresolved issues. 47 U.S.C. § 252(b) (1). If either or both parties disagree with the terms within the interconnection agreement, as arbitrated by the state public utility commission, a review by a federal district court is available to the aggrieved party. 47 U.S.C. § 252(e)(6).

In addition, the 1996 Act has a special provision for those regional "Bell operating companies, "that split off from AT & T as the result of a 1982 antitrust settlement. Prior to the passage of the1996 Act, these companies had been precluded from providing long distance telephone service to their customers. However, Congress, in its enactment of the 1996 Act, provided these Bell operating companies with an opportunity to enter the long distance market in a state within its service area if certain steps were undertaken to open its local service market to competition. *Sprint Communications Co. L.P. v. F.C.C.*, 274 F.d3d 549, 551 (D.C.Cir.2001).

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[9] This case is identified as "*USTA II.*"

[10] *Order on Remand, In re Unbundled Access to Network Elements*, 20 F.C.C. R. 2533 (2005).

Section 271 of the Act specifically deals with the ability of the Bell operating companies to provide long distance services. 47 U. S .C. § 271(d). In order to gain permission to offer long distance services in a state in which a Bell operating company provides local service, the 1996 Act requires it to apply for approval with the FCC. 47 U.S.C. § 271(b)(1). Thereafter, the FCC has a period of ninety days from the date of the application in which to grant or deny the request for approval, based on whether the Bell operating company has satisfied the statutory prerequisites. In order to receive approval from the FCC, a petitioning Bell operating company must meet the fourteen identifiable requirements of a "competitive checklist" in Section 271(c)(2)(B).

IV.

In February 2005, AT & T Michigan notified competing carriers of its intention to modify some of the existing interconnection agreements which, arguably, were no longer in compliance with the FCC regulations. However, some of the competing carriers, including the Defendant-Intervenors, proffered their objections to this proposal with the MPSC, contending that AT & T Michigan should not be allowed to unilaterally modify the interconnection agreements.

Thereafter, the MPSC initiated a proceeding (case no. U-14447), in which it initially directed the parties to engage in a collaborative process as a means of resolving their disagreements. Two of the Defendant-Intervenors (*i.e.*, Talk America, Inc., and XO Communications Services, Inc.), added an additional issue to the collaborative process, contending that the interconnection agreements had not adequately implemented some of the rulings by the FCC in the *TRO* that had not been adversely affected by *USTA II* or the *TRRO*. As a result, the MPSC expanded the collaborative process to include those issues that had been raised by these two competing carriers.

On September 20, 2005, the MPSC rendered the "September Order" which included its decisions relating to twenty-nine of the issues that had been raised by the parties, five of which have been challenged by AT & T Michigan and are the subject of this appeal.

V.

There is a disagreement between the Plaintiff and the Defendant-Intervenors over whether AT & T Michigan's obligations under 47 U.S.C. § 271 should be included in their interconnection agreements and, if so, to what extent. In its September Order, the MPSC declined to adopt the suggested language by either party regarding their respective obligations under Section 271. However, the MPSC, in reasserting its authority to issue the now-challenged directive, ordered the parties to negotiate, stating:

> The Commission is still convinced that obligations under Section 271 should be included in the interconnection agreements approved pursuant

> to Section 252. However, the Joint CLEC's[11] must negotiate with SBC[12] concerning terms and conditions, seeking Commission arbitration if necessary. If the CLECs experience problems with obtaining items available pursuant to Section 271, they may take appropriate enforcement action.

September Order at 16.

AT & T Michigan challenges the efficacy of this ruling, maintaining that the MPSC did not have the authority to issue such a directive. The Defendant-Intervenors argue that this challenge by AT & T Michigan is not ripe for a decision and should be dismissed. They point out that the September Order only outlined an appropriate method upon which to resolve any potential Section 271 disputes, claiming that AT & T Michigan had not presented the Court with a justiciable case or controversy.

Contrary to this argument by the Defendant-Intervenors, the September Order does impose a binding duty upon AT & T Michigan that it negotiate and include Section 271 obligations in its Section 252 agreements. Hence, the Court finds that this issue presents a justiciable case or controversy, and that a resolution of this matter by the Court is proper and necessary.

Next, AT & T Michigan argues that the directive in the September Order, which includes Section 271 obligations in its interconnection agreements, is without any justifiable legal basis. AT & T Michigan initially points to the structure of the 1996 Act that established two separate regulatory frameworks in which to govern two distinct markets. In one framework, it established competition for local telephone service. In the other framework, it discussed the entry by the Bell operating companies into long-distance markets. Section 251 is the linchpin of the framework on local telephone service. 47 U.S.C. § 251-261. Whereas, Section 271 appears in the framework of the 1996 Act which relates to Bell operating companies. 47 U.S.C. § 271-276.

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[11] Competing carriers are often referred to as CLECs in the telecommunications industry.

[12] AT & T Michigan Michigan had previously conducted its business operations as "SBC."

Congress gave decision-making authority to the various state public utility commissions, such as the MPSC, in only one of these frameworks; namely, governance over those matters that pertained to competition in local telephone markets. In sharp contrast to the shared federal and state authority for local telephone markets, Congress established a separate framework for those Bell operating companies that are administered solely by the FCC. Approval for the Bell operating companies to provide long distance service under Section 271 is expressly granted by the FCC-not the state utility commission. If an aggrieved party believes that a Bell operating company-like AT & T Michigan-does not satisfy the requirements of Section 271, a complaint may be filed with the FCC. 47 U.S.C. § 271(d)(6).

The MPSC and the Defendant-Intervenors have a different view of this issue. They point to Section 271(c)(2)(A)(ii), which requires a Bell operating company-as a condition precedent to providing long distance services to its customers-to satisfy the requirements of Sections 251 and 252. By directly referencing these paragraphs within Section 271, the

1996 Act incorporates the obligation of a Bell operating company to comply with the requirements of Section 252. It is also undisputed that approval from the FCC for a Bell operating company to enter a long-distance market under Section 271 initially depends on a review and approval by the state public utility commission. This state approval process acts as a further binder of these two sections. The Defendant-Intervenors also argue that a broadly implied authority exists under Section 252 for the state public utility commissions to undertake the necessary action to effectuate the Act, including Section 271.

Unfortunately, there is no direct case law on this issue within this Circuit. However, AT & T Michigan cites to *Indiana Bell Tel. Co. v. Indiana Util. Reg. Comm'n*, 359 F.3d 493, 497 (7th Cir.2004), in which the Seventh Circuit Court of Appeals opined that a state public utility commission may not "parlay its limited role in issuing a recommendation under section 271, involving long-distance service, into an opportunity to issue an order, ostensibly under state law, dictating conditions on the provision of local service."

Following its review of the record, the Court concludes that the MPSC does not have the authority to direct the parties to negotiate those terms and conditions which pertain to Section 271 in the interconnection agreement process. Section 271 grants oversight authority to the FCC, but not to the state public utility commissions. Thus, the Court declares the directive by the MPSC, as found in the September Order relating to this matter, to have been unlawfully issued and must be set aside.

VI.

In the dispute resolution process that preceded the issuance of the September Order, the parties debated the issue as to whether AT & T Michigan, as an incumbent carrier, must continue to provide entrance facilities to competing carriers at TELRIC-rates.[13] The MPSC, in its September Order, determined that AT & T Michigan was obligated to provide "entrance facilities to the extent required for interconnection pursuant to Section 251(c) of the 1996 Act." September Order at 13.[14]

As a network element, entrance facilities are subject to an "impairment" analysis under Section 251(d)(2) of the Act to determine whether they must be unbundled (*i.e.*, leased to requesting carriers at TELRIC based rates) under Section 251(c)(3). *USTA II*, 359 F.3d at 586. In the *TRRO*, the FCC conducted an impairment analysis and concluded that entrance facilities can be procured by competing carriers at a low cost with no impairment to competing carriers. *TRRO* ¶ 138. The FCC declared that competing carriers can readily obtain these facilities from other sources or economically provide them for themselves. The FCC also rendered the following declaration in ¶ 140, which is the source of the dispute between the parties in this case, as well as the authority upon which the MPSC relied on in making its finding regarding entrance facilities:

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[13] Unbundled network elements (UNEs) must be provided at cost-based rates, 47 U.S.C. 252(d)(1), and the FCC has defined the methodology to set such prices. This methodology is commonly known within the industry as "TELRIC," which stands for Total Element Long-run Incremental Cost. This technical term translates to "cost-based rates," as opposed to "retail rates."

[14] The term "entrance facilities" was defined by the D.C. Circuit Court of Appeals as "dedicated transmission facilities that connect ILEC and CLEC locations." *United States Telecom Ass'n v. FCC*, 359 F.3d 554, 585 (2004). In a layman's term, entrance facilities can be defined as the mechanism that is used to transport traffic between networks. Under the 1996 Act, entrance facilities are defined as a "network element" to which incumbent carriers must provide competing carriers with unbundled access pursuant to 47 U.S.C. § 251(c)(3). *TRRO* at ¶¶ 136-137.

> We note in addition that our finding of non-impairment with respect to entrance facilities does not alter the right of competitive LECs to obtain interconnection facilities pursuant to section 251(c)(2) for the transmission and routing of telephone exchange service and exchange access service. Thus, competitive LECs will have access to these facilities at cost-based rates to the extent that they require them to interconnect with the incumbent LEC's network.

TRRO, at ¶ 140. In the next paragraph, the FCC opined that "[t]he evidence described above convinces us that competitive LECs are not impaired without access to entrance facilities." *TRRO* at ¶ 141.

The Defendant-Intervenors and the MPSC have taken the position that ¶ 140 represents an acknowledgment by the FCC that entrance facilities can be used by CLECs for different purposes. They maintain that entrance facilities can be used in two ways; namely, (1) to provide a final link in the transmission path between a competing carrier's customer and the carrier's switch, and (2) to serve as interconnection facilities with which to exchange traffic between incumbent and competing carriers' switches. The Defendant-Intervenors claim that the first situation (known in the industry as "backhauling,") is where a competing carrier uses an incumbent's entrance facilities to carry traffic to and from its own end users. However, they acknowledge that a competing carrier in this situation is not entitled to use the entrance facilities at TELRIC-rates. On the other hand, the Defendant-Intervenors submit that, in dealing with the second situation, a competing carrier, which uses entrance facilities to interconnect with the incumbents network, is entitled to cost-based rates.

In a counter-argument, AT & T Michigan asserts that the MPSC's interpretation of ¶ 140 of the *TRRO*, if adopted, would have the practical effect of nullifying the earlier findings by the FCC. AT & T Michigan maintains that competing carriers have the right to obtain interconnection facilities pursuant to § 251(c)(2), without any corresponding right to lease such facilities at TELRIC rates.

The Court agrees with AT & T Michigan and concludes that the September Order which pertains to this issue does not comply with the rules that were adopted by the FCC pursuant to Section 251. It is not reasonable to interpret an explanatory comment, such as the one found in ¶ 140 of the *TRRO*, in a manner that undermines the plain meaning of the rule. The meaning of ¶ 140 must be interpreted in light of the FCC rule, which provides that entrance facilities need not be provided by incumbent carriers to competing carriers on an unbundled basis. The *TRRO* conveys the finding by the FCC that entrance facilities should be offered competitively. A review of the ruling by the MPSC reveals that the September Order does not comply with this directive, and, accordingly, must be set aside.

VII

AT & T Michigan also challenges the holding by the MPSC in its September Order as it relates to how to define the term "business lines." In its directive, the MPSC rejected AT & T Michigan's position on the definition of business lines serving a wire, and instead incorporated the following language that had been proposed by the competing carriers into its September Order:

> The Commission finds that the first sentence of the FCC's rule defining business lines requires that, to be counted as a business line, the line must serve a business customer. The remaining portion of the definition presumes serving a business customer and clarifies that any loop, whether UNE-P, UNE-L, or leased line will be counted when it serves a business customer. Therefore, the Commission concludes that the language proposed by the Joint CLECs should be adopted for purposes of the amendment to the interconnection agreements.

September Order at 9.

As explained above, the 1996 Act requires incumbent carriers to share, or unbundle, certain network elements with competing carriers. Section 251(d)(2) states that in determining which network element must be unbundled, the FCC must find that the network element satisfies the "necessary and impair" standard; *i.e.*, that the element must be necessary for a competing carrier, and the competing carrier must be impaired without access to the incumbent's element at issue. Loops and transport circuits are network elements. In the *TRO* and the *TRRO*, the FCC grappled with trying to determine whether and where competing carriers were impaired if they could not obtain loops and transport circuits from incumbent carriers.

An impairment does not exist in those locations in which the economics of the market justify the construction of competitive facilities or where network elements can be obtained from providers other than incumbent carriers. In the *TRRO*, the FCC determined that, in those circumstances involving high-capacity loops and transport wherein it could not cite to conclusive evidence of non-impairment in particular markets or on particular transport routes between wire centers, the presence of multiple fiber-based collocators and a high concentration of business lines in incumbent wire centers provided a reasonable "proxy" for identifying those situations in which an impairment did not exist. *TRRO* at ¶¶ 78-103. Specifically, the FCC stated:

> We have weighed carefully a variety of actual competitive indicia for determining impairment and determine that the best and most readily administered indicator of the potential for competitive deployment is the presence of fiber-based collocators in a wire center. We also determine that business line density in a wire center is a useful tool to infer where carriers are likely to hve collocated with fiber, and thus, a measure of where competitors are capable of duplicating the incumbent LEC's network. Both of these measures constitute proxies for where sufficient revenue opportunities exist to justify the high fixed and sunk costs of transport deployment.

TRRO at § 93.

In accordance with these findings, the FCC established specific numerical thresholds for the number of "business lines" and/or fiber-based collocators in a wire center. Once a wire center exceeds these thresholds, the incumbent is no longer required to unbundle high-capacity loops to transport wire from that center. For example, once a wire center is served by at least 60,000 business lines and at least four fiber-based collocators, no future DS1 loop[15] unbundling will be required in that wire center. For DS3 loops[16], the threshold is met by a wire center with at least 38,0000 business lines and at least four fiber based collocators. 47 C.F.R. § 51.319(a)(5)(I).

Thus, the issue between AT & T Michigan and the Defendant Intervenors is which lines are counted as business lines. The FCC's regulations defined business line in the following manner:

> A business line is an incumbent LEC-owned switched access line used to serve a business customer, whether by the incumbent LEC itself or by a competitive LEC that leases the line form the incumbent LEC. The number of business lines in a wire center shall equal the sum of all incumbent LEC business switched access lines, plus the sum of all UNE loops connected to that wire center, including UNE loops provisioned in combination with other unbundled elements.

47 C.F.R. § 51.5.[17]

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[15] A DS1 loop is a type of loop that carries that equivalent of 24 voice grade telephone lines.

[16] A DS3 loop carries the equivalent of 672 individual voice grade telephone lines.

[17] "UNE" stands for "unbundled net-work element," and refers to those elements which must be unbundled, or shared, with competing carriers.

AT & T Michigan submits that the MPSC, when declaring in its September Order that "to be counted as a business line, the line must serve a business customer," rendered an interpretation which, in its judgment, was unlawful. Further, it maintains that the number of business lines counted should include all UNE loops, and claims that the MPSC's interpretation only counts "some" UNE loops.

In support of its argument on this issue, AT & T Michigan looks first to the regulatory language which it believes to be clear and unambiguous, noting that it uses the phrase, "all UNE loops." 47 C.F.R. § 51.5. Moreover, the directive to count "all UNE loops" is consistent with the FCC's underlying goal that impairment criteria be simple and easy to administer. Pursuing this issue, AT & T Michigan argues that while counting all loops is a relatively simple task, as this data has already been tracked, a compilation of pertinent data on loops connected to businesses is more complicated. Many states, including Michigan, do not have the ability to determine whether a standalone loop is being used to serve a business customer or a residential customer. AT & T Michigan points out that a loop belongs to an incumbent carrier, whereas the customer belongs to its competitor who possesses the knowledge about the use of the loop-not the incumbent.

The Defendant Intervenors defend the MPSC interpretation which, it believes, is correct and reflects the FCC's intention to limit the number of business lines as a proxy for determining where revenue opportunities exist. They also point to ¶ 103 of the *TRRO*, which explains the FCC's decision to focus on business line density, stating:

> Business line density . . . is an administrable proxy for determining where significant revenues are available sufficient for competitors to deploy transport facilities, despite the fixed and sunk costs of deployment. . . . Further, business lines are a more accurate predictor than total lines because transport deployment largely has been driven by the high bandwidth and service demands of businesses, particularly in areas where business locations are highly concentrated.

TRRO, ¶ 103.

The Court disagrees with the Defendant Intervenors, and concludes that the September Order improperly confuses the definition of a business line with the procedure that is used for counting it as specified in the governing regulation, 47 C.F.R. 51.5. Unfortunately, the September Order ignores the plain language of the regulation, and transforms an otherwise unambiguous phrase, "all UNE loops," to mean only some UNE loops. Moreover, the Court concludes that the MPSC, in misconstruing the regulation, has violated existing federal law. Accordingly, this part of the September Order must be voided.

VIII.

Prior to the *TRRO*, which was issued in February 2005, local switching was often provided to competing carriers in a combination of unbundled network elements (or "UNEs") known as the "UNE Platform," or "UNE-P." The UNE Platform provided a competing carrier with unbundled access to a pack-age of network elements that are composed of switching, a local loop, and a shared transport of calls between wire centers.[18] The entire platform was provided to competing carriers at cost-based, or TELRIC, rates.

In the *TRRO*, the FCC determined that there was no longer any need for local switching to be unbundled by incumbent carriers to competing carriers. To put it simply, after the holding in the *TRRO*, local switching was no longer a UNE (unbundled network element). As a result, competing carriers are not entitled to use the local switching of the incumbent carriers at cost-based rates, and the original method of providing a group of network elements through the UNE Platform has been eliminated.

In the *TRRO*, the FCC also determined that rather than require competing carriers to immediately switch from paying cost-based rates to retail rates for local switching, it would allow the participants a period of transition in which to adjust. The purpose of the transition was to provide for an "adequate time for both competing LECs and incumbent LECs to perform the tasks necessary to an orderly transition, which could include deploying competitive infrastructure, negotiating alternative access arrangements, and performing loops cut overs or other conversions." *TRRO* at ¶ 227. To put it simply, the transition was designed to ensure an orderly migration of the UNE Platform and unbundled switching. To that end, the FCC required incumbents to continue to "provide access to local circuit switching on an unbundled basis" to a carrier's "embedded base" of end-user customers for a 12-month period. 47 C.F.R. Section 51.319(d)(2)(iii). It adopted a new rate applicable during the 12 month transition period of the existing UNE Platform rate plus a dollar. The *TRRO* stated that this would:

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[18] It is understood within the telecommunications industry that a local exchange network is comprised of three elements: (1) local loops, which are the wires connecting telephones to switches; (2) switches, which are the equipment that directs calls to their to their destinations; and (3) transport trunks, which are the wires carrying calls between switches. *AT & T Michigan Corp. v. Iowa Utilities Bd.*, 525 U.S. 366, 371, 119 S.Ct. 721, 142 L.Ed.2d 835 (1999).

> help ensure an orderly transition by mitigating the rate shock that could be suffered by competitive LECs if TELRIC pricing were immediately eliminated . . . while at the same time, these price increase, and the limited duration of the transition, provide some protection of the interests of the incumbent LECs in those situations where unbundling is not required.

TRRO at ¶ 228.

In the negotiation and arbitration that led up to the September Order, the parties raised the issue of the appropriate rate for competing carrier customers who migrated to a functionally equivalent AT & T Michigan service arrangement (*e.g.*, resale) before the transition period ended on March 11, 2006. The September Order adopted the language provided by the Defendant-Intervenors, and held that, unless the competing carrier requests or agrees otherwise, the FCC-established transition rate (*i.e.*, the UNE Platform rate plus one dollar) would apply.

In order to phase out the UNE Platform, competing carriers were given a period of one year to transition their customers to a different commercial arrangement. AT & T Michigan contends that once the customer is switched to a new carrier, the transition rate should no longer apply, and a retail rate should apply in its place. AT & T Michigan argues that requiring it to provide local switching at the transition rate after the customer has been "resold" to another carrier constitutes an unlawful unbundling, in violation of the *TRRO*.

The Court disagrees with this argument by AT & T Michigan. On this issue, the September Order provision which calls for a designated transition period is clearly within the framework of ¶ 228 of the *TRRO*, which specifically gives state public utility commissions the discretion to implement these rates. The method within the September Order for dealing with the transition period is reasonable. Thus, the Court finds that it is in accordance with federal law.

IX.

FCC regulations require incumbent carriers "to make routine network modifications to unbundled transmission facilities such by requesting carriers where the requested transmission facility has already been constructed." *TRO* at ¶ 632; 47 C.F.R. Section 51.319(e)(4). For example, an incumbents' loops are not capable of functioning as digital high-capacity loops until the incumbent has modified them by removing certain equipment or adding other equipment. *TRO* at ¶¶ 633, 634. The same can be true of an incumbent's transport circuits. These technical modifications are commonly referred to in the industry as "routine network modifications."[19]

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[19] The FCC gave the following examples of necessary loop modifications required: "rearrangement or splicing of cable; adding a double or repeater; adding an equipment case; adding a smart jack; installing a repeater shelf; adding a line card; and deploying a new multiplexer or reconfiguring an existing multiplexer." *TRRO* at § 634.

Federal law requires that incumbents be compensated for the costs of making modifications. In the *TRO*, the FCC stated:

> The Commission's pricing rules provide incumbent LECs with the opportunity to recover the cost of the routine network modifications we require here. State commissions have discretion as to whether these costs should be recovered through nonrecurring charges or recurring charges. We note that the costs associated with these modifications often are reflected in the recurring rates that competitive LECs pay for loops. Specifically, equipment costs associated with modifications may be reflected in the carrier's investment in the network element, and labor costs associated with modifications may be recovered as part of the expense associated with that investment (*e.g.*, through application of annual charge factors (ACFs)). The Commission's rules make clear that there may not be any double recovery of these costs (*i.e.*, if costs are recovered through recurring charges, the incumbent LEC may not also recover these costs through a NRC).

In the September Order, the MPSC rejected the suggested language by AT & T Michigan regarding the recovery of costs for network modifications, and instead, adopted language that had been proposed by the competing carriers. The MPSC stated that costs "for which [AT & T Michigan] seeks to impose additional charges should be recovered through the charges approved in Case. No. U-13531." AT & T Michigan claims that this directive is arbitrary, capricious and violates the cost-recovery mandates of the 1996 Act, in that (1) the September 2004 order in

U13531 (which established new TELRIC rates for UNEs) was issued five months before the *TRRO*, and (2) the MPSC precluded it from seeking an update from September 2004 until September 2006. Therefore, AT & T Michigan concludes, the MPSC's order violates the cost-recovery mandates of the Act, the FFC's implementing orders, and is arbitrary and capricious. The Defendant Intervenors respond by pointing out that the MPSC gave AT & T Michigan a full opportunity to present its costs and to seek rates that would recover its costs while performing routine network modifications. Finally, they conclude that the decision by the MPSC is neither unlawful nor arbitrary and capricious.

On this issue, the Court finds that the September Order is within the discretion of the MPSC. More importantly, the Court determines that this provision neither violates the 1996 Act nor federal regulations. Hence, the arguments on this issue by AT & T Michigan are rejected.

VIII.

Accordingly, and for the reasons stated above, the Court will grant a summary judgment in favor of AT & T Michigan on the following issues: (1) The September Order ruling that obligations under Section 271 should be included in interconnection agreements under Section 252 is unlawful; (2) the declaration within the September Order ruling, which requires the unbundling of entrance facilities, is invalid; and (3) the definition of business lines in the September Order contravenes federal law. The Court will also grant a summary judgment in favor of the MPSC and the Defendant-Intervenors on the following issues: (1) the authority in the September Order which provides for the recovery of transition period rates is within the discretion of the MPSC, and (2) the contested language in the September Order which pertains to AT & T Michigan's recovery of routine network modification costs is lawful.

APPENDIX I

In the matter, on the Commission's own motion, to commence a collaborative proceeding to monitor and facilitate implementation of Accessible Letters issued by SBC MICHIGAN and VERIZON.

U14447

Michigan Public Service Commission At the September 20, 2005 meeting of the Michigan Public Service Commission in Lansing, Michigan.

By its action of September 20, 2005.

ORDER

PRESENT: Hon. J. Peter Lark, Chairman; Hon. Laura Chappelle, Commissioner; Hon. Monica Martinez, Commissioner.

BY THE COMMISSION

J. Peter Lark, Chairman

Laura Chappelle, Commissioner

Monica Martinez, Commissioner

On May 17, 2005, the Commission issued an order in this case modifying the process to be used to bring current interconnection agreements into compliance with the Federal Communications Commission's (FCC's) Triennial Review Order[1] (*TRO*) and its

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[1] Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Deployment of Wireline Services Offering Advanced

Triennial Review Remand Order[2] (*TRRO*). In place of the original process, the parties proposed the following:

1. By May 31, 2005, the parties will file a joint disputed issues list, which will reflect the issues the parties need to resolve. The parties will attempt to phrase each issue in an informative and neutral manner.

2. The disputed issues list will refer to contract language proposed by each party. The contract language should be written so that regardless of the combination of choices made for resolution of the disputes, the contract in its entirety is consistent. In other words, if option B is chosen on issue 1 and option A is chosen on issue 3, the related amendment language is not inconsistent. If such a result would occur, both issues 1 and 3 should be presented as one issue and the related amendment language changed. The parties will file a baseline document differentiating language that has been agreed-upon, disputed language SBC Michigan (SBC) proposes, and disputed language one or more of the competitive local exchange carriers (CLECs) want. If the accompanying baseline language related to this issue can be conveniently inserted into the disputed issues list, it should be so inserted. If on any particular issue the

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Telecommunications Capability, CC Docket Nos. 01-338, 96-98, 98-147 Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, 18 FCC Rcd 16978, 16984 (2003), *vacated in part*, *United States Telecom Ass'n v. FCC*, 359 F.3d 554 (DC Cir 2004).

[2] *In the Matter of Unbundled Access to Network Elements, Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, WC Docket No. 04-313, CC Docket No. 01-338, FCC 04-179 (*rel'd* August 20, 2004).

accompanying baseline language cannot easily be inserted in the disputed issues list, the list will reference the baseline language at issue.

3. By June 14, 2005, each party may file in this docket all affidavits, exhibits, briefs, or other material or information upon which that party relies to support its position on each issue on the disputed issue list. Parties are not required to file support of every issue. If no party files in support of any particular issue, that issue will be decided in favor of SBC. Similarly, if SBC does not file in support of any particular issue, then the issue will be decided in favor of the CLECs.

4. By June 24, 2005, each party may file a response to the June 14, 2005 submissions.

5. The Commission will rule on the disputed issues without need for further submissions or hearing, unless the Commission determines otherwise. The Commission will also set a schedule for filing the amendments that conform to the Commission's ruling for approval. All parties reserve their rights to appeal any Commission ruling.

In the May 17 order, the Commission adopted the process proposed by the parties, while urging them to continue to narrow issues and negotiate resolutions to as many issues as possible before submitting the disputed issues list to the Commission.

On June 3, 2005, the Commission Staff (Staff) filed, on behalf of the active participants in the collaborative, a joint list of 29 disputed issues. Along with that disputed issues list, the Staff submitted a double-redlined version of the contract language at issue, marked according to whether the disputed language was proposed by a competitive local exchange carrier (CLEC) or SBC Michigan (SBC).

On June 14, 2005, SBC and the Joint CLECs[3] submitted briefs and testimony and other evidence in support of their respective positions concerning the appropriate resolution of the issues placed before the Commission. On June 24, 2005, the parties submitted reply briefs.

On June 14, 2005, Verizon North Inc. and Contel of the South, Inc., d/b/a Verizon North Systems (Verizon) filed its submission concerning the joint disputed issues list. On June 24, 2005, responses to Verizon's submission were filed by TC3 Telecom, Inc. (TC3), TelNet Worldwide, Inc. (TelNet), and XO Communications Services, Inc. (XO). Thereafter, on June 30, 2005, Verizon filed a motion to strike those responses to its submission. By July 18, 2005, Tel-Net, TC3, and XO had filed responses to Verizon's motion.

On July 7, 2005, the parties filed notice that they had resolved Issue 15. On August 5, 2005, the parties filed a joint notice that they had resolved Issues 25 and 26 and part of Issue 23.

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[3] The parties referred to as the Joint CLECs include the following companies: American Farm Bureau, Inc., AT&T Communications of Michigan, Inc. (AT&T), CMC Telecom, Inc., Climax Telephone Company, GRID 4 Communications, Inc., Easton Telecom Services, L.L.C., LDMI Telecommunications, Inc., MCImetro Access Transmission Services LLC, McLeodUSA Telecommunications Services, Inc., Neutral Tandem - Michigan, LLC, NOW Communications, Inc., PNG Telecommunications Inc., Quick Communications, Inc., d/b/a Quick Connect USA, Superior Technologies, Inc., d/b/a Superior Spectrum, Inc., Talk America Inc., TCG Detroit, TelNet Worldwide, Inc., Trinsic Communications, Inc., XO Communications Services, Inc., and Zenk Group, Ltd., d/b/a Planet Access.

SBC/CLEC Issues

Issue 1. Definition of Buildings

SBC explains that in the TRRO the FCC has restricted the ability of CLECs to purchase unbundled DS1 and DS3 loops to a maximum of ten DS1 loops and one DS3 loop for any single building. Id. ¶¶ 177 and 181, 47CFR 51.319(a)(4)(ii) and (a)(5)(ii). SBC proposed language for Section 0.1.1 of the amendment which would define a building as a "structure under one roof." With respect to campus environments, SBC proposes that the definition provide that an educational, industrial, governmental, or medical premises or campus shall constitute a single building for purposes of the DS1 and DS3 limitation. SBC states that in such campus environments, SBC is not permitted to provision loops to each separate structure. Rather, SBC must deliver all loops to a single structure, and the campus owner or administrator connects the loop to facilities serving additional structures. Thus, SBC argues, logic dictates that the loop volume caps must be based on the volume of loops provisioned to that structure.

In contrast, SBC argues, the Joint CLECs' proposed definition of a building would be virtually impossible to administer and would effectively eviscerate the FCC's limitations on the unbundling of DS1 and DS3 loops. SBC complains that it would have to perform a title search to determine whether a building is a building for purposes of these limitations. It argues that the effect of the Joint CLECs' definition would be to permit a CLEC to obtain scores of unbundled DS3 loops in a single building that happens to have a large number of suites - a result, it argues, that the *TRRO* does not permit.

The Joint CLECs argue that many CLECs focus their marketing efforts on the needs of small and medium sized businesses, generally using DS1 loops, which are rarely economical to construct. The Joint CLECs assert that their definition of a building should be adopted because it properly balances the complexities arising when dealing with multi-tenant property. They argue that SBC's definition would make the entire Michigan State University campus one single building, which, they argue, ignores any plain meaning of the FCC's chosen term "single building."

Moreover, the Joint CLECs argue, SBC's overly expansive definition appears to be designed to restrict to the greatest extent possible the ability of CLECs to serve certain customers. On the other hand, they argue, the Joint CLECs' proposed definition applies a common sense and reasonable interpretation to the term "single building," which is consistent with the FCC's underlying analysis of what may not be economic to serve without the availability of unbundled loops.

The Commission finds that the SBC-proposed definition of a building is the closest of the two to the commonly understood meaning of "single building," with one exception. The Commission finds that the portion of the definition that would require considering an entire campus or set of government or medical buildings to be a single building for purposes of the caps on the availability of DS1 and DS3 facilities should be deleted. The Commission is not persuaded that the fix proposed by the Joint CLECs actually takes care of the problem. Therefore, the Commission concludes that the entire last two sentences of Section 0.1.1 should be deleted.

Issue 2. Fiber to the Home (FTTH), Fiber to the Curb (FTTC), and Hybrid Loops

a. Obligations to other than Mass Market Customers SBC contends that the Joint CLECs' proposals on this issue are an attempt to revive unbundling requirements for large business customers eliminated by the FCC, and should be rejected. SBC argues that the FCC eliminated most unbundling requirements for FTTH and FTTC, citing 47 CFR 51.319(a)(2) and (3). SBC points out that there is no language in the FCC's rules that supports reading in a limit to the definition of FTTH or FTTC as to those loops that serve the mass market customers, defined as those customers served by less than four DS0s. SBC argues that in the *TRO*, the FCC eliminated any requirement to unbundle enterprise market loops, while generally maintaining unbundling requirements for mass market loops, except FTTH. It argues that in the TRO, the FCC has now extended the same unbundling framework applicable to FTTH loops to FTTC loops. 47 CFR 51.319(a)(3). SBC argues that its proposed language for defining FTTH loops in Section 0.1.4 virtually quotes verbatim the FCC's definition in the related rule.

The Joint CLECs argue that the FCC's unbundling relief for FTTH, FTTC, and hybrid loops, as delineated in the *TRO*, is limited to those loops serving the mass market. They state that the FCC has repeatedly affirmed this position in its orders and cites supporting statements of then-Chairman Powell. Although admitting that SBC's position on the issue is supported by an "unexplained ambiguity in the FCC's adopted rules," they argue that the FCC's orders and their stated purpose demonstrate that the Joint CLECs' position should be adopted.

The Joint CLECs argue that the only discussion in the TRO with respect to limiting the unbundling obligations of incumbent local exchange carriers (ILECs) for FTTH, FTTC, and hybrid loops occurs in the mass market loop section of the order. The Joint CLECs state that the FCC's explicit intent in limiting the requirement to provide these elements was to encourage the construction of facilities by CLECs to provide broadband to the mass market. Thus, the Joint CLECs argue, the FCC never intended these limits to apply to the enterprise market, and the Commission should approve the Joint CLECs' proposed language.

The Commission finds that the Joint CLECs' proposal to include a limitation for the definition of FTTH, FTTC, and hybrid loops should be rejected. First, the Commission notes that there is no language within the FCC rule defining these loops that would so limit the definitions. Further, the Commission notes that in the *TRO*, the FCC stated that although it was adopting rules specific to each loop type, its determination concerning unbundling obligations and limitations for such loops do not vary based on the customer to be served. *TRO*, ¶ 210. Therefore, the Commission is persuaded that the FCC did not create an ambiguity in its rules by not including the "mass market customer" limitation proposed by the Joint CLECs. The language as proposed by SBC should be adopted with respect to this sub-issue.

b. Mass Market Definition

The Joint CLECs state that the FCC did not precisely define the line between a mass market customer and an enterprise customer. The Joint CLECs propose that the line should be drawn to include all residential customers and those business locations served by telecommunications capacity of less than four DS0s. It states that SBC would extend the definition to include all business locations served with a capacity of less than 24 DS0s. The Joint CLECs argue that their proposal is more consistent with the FCC's orders and has even been argued by SBC in other contexts as an appropriate set point for determining a mass market customer versus an enterprise customer.

SBC did not present argument on this sub-issue.

The Commission finds that the language proposed by the Joint CLECs should be adopted for Section 0.1.6, although given the finding above, it is unclear what the definition will accomplish for the Joint CLECs.

c. Predominantly Residential Definition

The parties disagree on the appropriate definition of predominantly residential as that term is used to denote a multi-dwelling unit, which is served consistently with rules for residential service. SBC would prefer that no definition be established for predominantly residential, because the FCC did not adopt one, stating that a determination would be obvious on the facts of the nature of a particular building. As an alternative, SBC proposes that the section should define a predominantly residential building as one that allocates more than 50% of its rentable square footage to residential use. The Joint CLECs desire to define residential building as one using 75% or more of the rentable space allocated to residential use.

The Commission finds that to be predominantly residential, a multiple dwelling unit should have greater than 50% of its rentable space allocated to residential use. Therefore, the Commission adopts SBC's proposal for this sub-issue.

d. The parties have agreed to remove Section 8.1.5 to resolve this dispute.

Issue 3. Definition of Business Lines

The issue presented by the parties is whether stand-alone unbundled network element (UNE) loops used to serve residential customers should be counted as business lines for purposes of the wire center non-impairment determinations for high-capacity loops and transport. SBC argues that in the TRRO, the FCC determined that CLECs are not impaired without access to DS3 high capacity loops in wire centers with at least 38,000 business lines and 4 or more unaffiliated fiber-based collocators, and that CLECs are not impaired without access to DS1 loops in wire centers with at least 60,000 business lines and 4 or more unaffiliated fiber-based collocators (Tier 1 wire centers). SBC further argues that the FCC held that CLECs are not impaired without access to DS3 UNE dedicated interoffice transport or interoffice dark fiber transport on any route between wire centers that are either Tier 1 or non-Tier 1 wire centers that contain at least 24,000 business lines or 3 or more unaffiliated fiber-based collocators (Tier 2 wire centers). SBC states that the definition of business line is found in 47 CFR 51.5, which provides:

> A business line is an incumbent LEC-owned switched access line used to serve a business customer, whether by the incumbent LEC itself or by a competitive LEC that leases the line from the incumbent LEC. The number of business lines in a wire center shall equal the sum of all incumbent LEC business switched access lines,

> plus the sum of all UNE loops connected to that wire center, including UNE loops provisioned in combination with other unbundled elements. Among these requirements, business line tallies (1) shall include only those access lines connecting end-user customers with incumbent LEC end-offices for switched services, (2) shall not include non-switched special access lines, (3) shall account for ISDN and other digital access lines by counting each 64 kbps-equivalent as one line. For example, a DS1 line corresponds to 24 64 kbps-equivalents, and therefore to 24 "business lines."

SBC argues that its proposed definition of business lines quotes verbatim the definition set out in Rule 51.5. It argues that the manner in which Michigan defines a business customer for rating purposes is irrelevant to the appropriate definition to be used in the interconnection agreement. According to SBC, the FCC has definitively resolved this issue in the *TRRO* and its rules. SBC argues that the Commission is not free to substitute another definition for the one adopted in the FCC's rules.

The Joint CLECs respond that SBC's definition attempts to turn a residence into a business, while the definition proposed by the Joint CLECs merely uses common sense and plain English to limit the definition of business lines to lines purchased by business customers, as required by the first sentence of the FCC's definition.

The Commission finds that the first sentence of the FCC's rule defining business lines requires that, to be counted as a business line, the line must serve a business customer. The remaining portion of the definition presumes serving a business customer and clarifies that any loop, whether UNE-P,[4] UNE-L,[5] or leased line will be counted when it serves a business customer. Therefore, the Commission concludes that the language proposed by the Joint CLECs should be adopted for purposes of the amendment to the interconnection agreements.

Issue 4. Definition of SBC Affiliate

The parties disagree as to whether a party that has entered into a binding agreement, which, if consummated, would result in its becoming an affiliate of SBC should be counted as an SBC affiliated, fiber-based collocator for purposes of the non-impairment determinations for high-capacity loops and transport prior to the consummation of the agreement. SBC states that its definition of fiber-based collocator is identical to that set out in Rule 51.5, 47 CFR 51.5, which refers to the definition of affiliate in 47 USC 153. That section provides:

> The term "affiliate" means a person that (directly or indirectly) owns or controls, is owned or controlled by, or is under common ownership or control with another person. For purposes of this paragraph, the term "own" means to own an equity interest (or the equivalent thereof) of more than 10 percent.

SBC argues that the Joint CLECs proposed definition would redefine the term to include "any entity that is currently subject to a binding agreement that, if consummated, would result in it becoming an affiliate of SBC as so defined." SBC argues that the proposal is contrary to the FCC's rules. SBC argues that the proposed language targets the proposed merger between itself and AT&T, since it is limited to potential affiliates of SBC, rather than potential affiliates of other parties for whom mergers may be planned. SBC argues that if the FCC had intended to include inchoate mergers, it could have, and presumably would have said so. Moreover, for purposes of determining non-impairment, SBC argues, it is only relevant to understand that AT&T became a fiber collocator when it was not an affiliate of SBC. On that basis lies the inference that revenue opportunities exist for CLECs at that wire center.

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[4] UNE-P refers to the unbundled network element platform, which includes the loop, unbundled local switching, and transport.

[5] UNE-L refers to an unbundled loop.

The Joint CLECs respond that because classification of a wire center as non-impaired is one that cannot be reversed, reasonable safeguards should be adopted to prevent basing that determination on temporary facts or circumstances. One such circumstance, the Joint CLECs argue, is when one of the competitive fiber-based collocators at a wire center is imminently subject to a binding agreement to become affiliated with SBC. The FCC's determination in the *TRRO* that when tallying fiber-based collocators for purposes of the transport impairment analysis, parties shall only count multiple collocations at a single wire center by the same or affiliated carriers as one fiber-based collocation. They argue that it makes no sense to close a wire center to unbundling on Monday, if running the test on Friday would yield a different result.

The Joint CLECs argue that the FCC based its determination in part on the theory that when there are multiple fiber-based collocators, CLECs would have alternative providers for obtaining the facilities.

However, they argue, if the competitive alternative is about to become an affiliate and make no facilities available to CLECs except on terms consistent with the ILEC, there are no real competitive alternatives and the CLECs are impaired without access to UNEs. They argue that adoption of the Joint CLECs' proposed language is dictated by common sense, fairness, and the public interest.

The Commission finds that the language as proposed by SBC should be adopted without the language proposed by the Joint CLECs. In the Commission's view, the federal rules do not support the Joint CLECs' position. Contrary to their arguments, the Commission is not free to rewrite the FCC's rules, to improve upon them, or ignore them when arbitrating interconnection terms. Rather, the Commission is bound by state statute to perform the duties delegated to it under the federal Telecommunications Act of 1996, 47 USC 251 *et seq.*, (federal Act), in a manner that is consistent with that act and the FCC's orders and rules. *See*, MCL 484.2201.

Issue 5. Entrance Facilities and Rates

SBC explains that an entrance facility is a form of dedicated transport that provides a transmission path between a SBC wire center and a switch owned by a requesting carrier. SBC states that in the *TRO*, the FCC held that CLECs are not entitled to unbundled access to entrance facilities, and reaffirmed that finding in the TRRO. SBC argues that it makes various transport facilities available that CLECs may use as "entrance facilities." It asserts that it will make en-trance facilities available, but not at total element long run incremental cost (TELRIC) pricing that is required for UNEs.

SBC argues that this is a correct conclusion based on the FCC's determination that entrance facilities are less costly to build, are more widely available from alternative providers, and have greater revenue potential than dedicated transport between ILEC central offices. SBC points out that the FCC noted the entrance facility may be the point of greatest aggregation on a CLEC's system. Moreover, SBC argues, CLECs have a unique degree of control over the cost of entrance facilities because they can choose the location of their own switches.

SBC urges the Commission to reject the Joint CLECs' attempt to require SBC to continue to provide entrance facilities at TELRIC-based rates, as violating the FCC's rules. SBC argues that the FCC views entrance facilities as distinct from interconnection facilities.

The Joint CLECs argue that SBC's proposal rests on the ILEC's assumption that it is no longer required to provide unbundled interoffice facilities to connect the CLEC premises or point of presence on the ILEC's network at TELRIC rates. Further, the Joint CLECs argue, SBC's argument confuses the ILEC's limited obligations under Section 251(c)(3) and those required by Section 251(c)(2) of the federal Act. They argue that in both the *TRO* and the *TRRO*, the FCC affirmed that CLECs have a right to interconnect at TELRIC rates with the ILEC's network for the transmission and routing of telephone exchange service and exchange access, pursuant to Section 251(c)(2). Further, the Joint CLECs argue that 47 CFR 59.319(e), which SBC relies upon for its argument that it is no longer obligated to provide interconnection facilities at cost based rates, is limited by its terms to the ILEC's obligations under Section

251(c)(3) of the federal Act, and does not limit a CLEC's right to obtain interconnection facilities at TELRIC rates.

The Commission finds that the language proposed by the Joint CLECs should be adopted as reflective of the FCC's finding that CLECs still have a right to entrance facilities to the extent required for interconnection pursuant to Section 251(c)(2) of the federal Act. SBC's language would eliminate any responsibility to provide those facilities at TELRIC rates, contrary to the FCC's specific findings. *See*, *TRRO*, ¶ 140.

Issue 6. SBC's Section 271 Obligations

The parties dispute whether and at what rate SBC's obligations pursuant to 47 USC 271 should be included in the amendment to the interconnection agreement required by the FCC's decisions in the *TRO* and the *TRRO*. SBC argues that the parties should negotiate mutually agreeable terms for Section 271 obligations outside the context of this Section 251 amendment. It argues that the Joint CLECs have proposed language that would obligate SBC to continue to provide elements required by obligations under Section 271 at TELRIC rates to meet the "just, reasonable, and non-discriminatory price" required by statute.

SBC argues that the Joint CLECs' proposed language is so poorly written as to be virtually unintelligible, and suffers from fundamental flaws. SBC states that the Joint CLECs' proposed language misstates SBC's obligations under Section 271, and then seeks to import both real and imaginary obligations under Section 271 into an interconnection agreement amendment offered pursuant to Sections 251 and

252. SBC takes the position that Section 271 obligations do not belong in an interconnection agreement reached pursuant to Sections 251 and 252. Moreover, SBC argues, there are important distinctions between obligations under the different sections of the federal Act. It argues that rate requirements differ: elements provided pursuant to Section 271 are provided at market-based rates that are "just and reasonable" prices, while elements that are required to be unbundled under Sections 251 and 252 are priced at TELRIC. Moreover, SBC argues, the FCC has exclusive jurisdiction to enforce or determine satisfaction of, or compliance with, Section 271 obligations. SBC asserts that the FCC also has jurisdiction over the prices governed by Sections 201 and 202. Moreover, SBC argues, only the FCC may determine to forbear enforcing the requirements of Section 271. In sum, SBC argues, there is no provision in the federal Act granting state commissions authority over determinations with regard to Section 271 in an arbitration pursuant to Sections 251 and 252. Thus, SBC concludes, there is no basis for attempting to impose Section 271 obligations into the parties' interconnection agreements, and such obligations are beyond the scope of this case.

The Joint CLECs argue that because Congress required that Section 271 rates and terms be included in Section 252 interconnection agreements, and because only the Joint CLECs have proposed such rates and terms, the Commission's "baseball" arbitration approach requires that the Joint CLECs' position be adopted. They argue that SBC may not refuse to include rates and terms for Section 271 elements in interconnection agreements. Citing Section 271(c)(1) and (2), the Joint CLECs argue that the federal act requires that SBC implement the checklist items through its interconnection agreements approved pursuant to Section 252. Moreover, the Joint CLECs argue, the FCC has stated that a Bell Operating Company (BOC) must satisfy its checklist obligations pursuant to state-approved interconnection agreements that set forth prices and other terms and conditions. The Joint CLECs urge the Commission not to confuse the approval and enforcement of Section 271 provisions, which belong to the FCC, with the state's role in establishing rates and terms in interconnection agreements approved pursuant to Section 252.

The Joint CLECs point out that the Commission has established rates for SBC's Section 271 obligations in the past, including those relied upon by SBC to obtain relief under that section from the interLATA[6] proscription. They argue that merely because the FCC has exercised authority over Section 271 rates by prescribing a "just and reasonable" standard does not preempt the state's authority to implement that standard.

The Joint CLECs further argue that they have proposed rates, terms, and conditions for Section 271 elements that are just and reasonable. SBC on the other hand, has not proposed any terms and conditions. Therefore, the Joint CLECs insist, the Commission must adopt the Joint CLECs' proposed terms and conditions, which provide for obtaining elements available under Section 271 at TELRIC rates, at least temporarily.

However, the Joint CLECs note that they recognize that TELRIC rates are not required for elements obtained solely under Section 271 obligations. Accordingly, they state, their proposal leaves the door open for SBC to propose new rates that, if later approved by the Commission, would immediately replace the TELRIC rates. In their reply brief, the Joint CLECs state that they are withdrawing the request for their proposed language in Section 1.5. That does not completely resolve the issue, however, because they have proposed language for Sections 5.9 and 13 that are also involved in this issue.

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[6] LATA refers to local access and transport area

The Commission is persuaded that the disputed language proposed by both parties should not be included in the amendment. The *TRO* and the *TRRO* did not affect SBC's Section 271 obligations. Those obligations may be argued and decided at a different time and in a more appropriate proceeding. Moreover, to grant the Joint CLECs' position would essentially require SBC to provide the UNE-P at TELRIC rates, which the Commission has already found would be inconsistent with the *TRO* and the *TRRO*. However, to approve SBC's proposed language in its entirety would exclude provisions for obtaining facilities pursuant to SBC's obligations under Section 271 from inclusion in the interconnection agreement and avoid the approval process required under Section 252. The Commission is still convinced that obligations under Section 271 should be included in interconnection agreements approved pursuant to Section 252. However, the Joint CLECs must negotiate with SBC concerning terms and conditions, seeking Commission arbitration if necessary. If the CLECs experience problems with obtaining items available pursuant to Section 271, they may take appropriate enforcement action.

Issue 7. Disconnect or Conversion of High Capacity Loops, Transport, and Dark Fiber SBC objects to a proposal by the Joint CLECs to include, as Section 4.4 of the amendment, the following language:

> SBC will process orders for DS1/DS3 High Capacity Loops, DS1/DS3 Dedicated Transport or Dark Fiber Transport conversion or disconnection consistent with the end of the applicable transition period identified in Section 4.1.1.4. SBC will not convert or disconnect these services prior to the end of the applicable transitional period unless specifically requested by the CLEC.

SBC argues that the proposed language is vague and its purpose is not clear. SBC muses that it may be that the Joint CLECs desire to create an inference that CLECs need not transition their high capacity loops until the last day of the transition period. SBC argues that such a result would be the antithesis of a transition period. SBC argues that if a CLEC has not sub-mitted the necessary orders to transition from ele-ments or combinations that SBC is no longer required to provide as UNEs before the end of the transition period, SBC must be able to convert those elements or combinations to an analogous service.

The Joint CLECs initially note that the reference within the proposed language needs correction to Section 4.1.1.5 rather than 4.1.1.4. They state that the issue here is that CLECs should be entitled to keep their UNE arrangements to the extent allowed for by the agreement through the transition period. They contend that, should a CLEC desire to discontinue a UNE arrangement earlier, it can issue an appropriate disconnect order to SBC. The Joint CLECs note that SBC has limitations on the number of conversions that can be made in a narrow time frame. However, the Joint CLECs take the position that SBC's limitations for conversion should not affect the Joint CLECs' right to UNE pricing up to the last minute.

The Commission finds the Joint CLECs' argument persuasive. At the conclusion of the transition period, all CLECs should be operating without reliance upon elements no longer required to be provided at UNE pricing. However, during the transition period, SBC may not disconnect these services without the CLEC's prior authorization or request. The Commission therefore adopts the Joint CLECs' proposed language for Section 4.4. The Commission expects the CLECs to work with SBC to ensure an orderly transition that minimizes disruption to customer service.

Issue 8. Charges for Transition

SBC proposed Section 2.1.3.3 of the amendment to require CLECs to pay non-recurring charges associated with the transition of their embedded customer base from TRO affected enterprise market unbundled local switching (ULS) and UNE-P. SBC asserts that it will only charge CLECs the applicable service charges set out in the interconnection agreement's pricing schedule, unless physical work is necessary. In the event that physical work is required, SBC argues that non-recurring charges provided for in the interconnection agreement should apply.

SBC urges the Commission to reject the Joint CLECs' proposed language which would prohibit SBC from imposing "any termination, reconnection, disconnection, or other nonrecurring charges, except for an Electronic Service Order (Flow Through) Record Simple charge" and would require that "any discontinuance of any *TRO* Remand Declassified Element and the conversion shall take place in a seamless manner that does not affect the customer's perception of service quality." CLEC proposed language Section 2.1.3.3.

In short, SBC argues, the Joint CLECs' proposed language would require SBC to perform massive amounts of work without compensation. Thus, it would violate SBC's statutory and constitutional rights to just compensation and must be rejected.

The Joint CLECs state that when they have sought to convert customers from UNE-P to UNE-L, SBC has attempted to bill a port disconnect fee for a stand alone port ($7.60) and a service order charge for the port disconnect ($1.77), even though the CLEC did not request a port disconnect or issue an order requesting a port disconnect. The Joint CLECs insist that disconnection charges are improper and should not be permitted.

Further, the Joint CLECs argue that MCL 484.2301(1)(m) prohibits SBC from bundling unwanted services or products for sale or lease to another provider. They argue that SBC violates that section when it bundles a port disconnect and related service order charge with a CLEC's order for loop connection.

In its reply brief, SBC argues that when a CLEC orders conversion of a UNE-P to UNE-L, that conversion requires a port disconnect in order to perform the requested task. Thus, it argues, it is justified in charging the port disconnect fee. Beyond that, however, SBC states that if a CLEC has a dispute concerning whether SBC's billing is appropriate, it may use the dispute resolution procedures in the interconnection agreement. SBC argues that this case is not a proper forum for resolving billing disputes.

The Commission is persuaded that the Joint CLECs' proposed language should be adopted. The Commission is concerned that SBC impose only the appropriate charges for these conversions. The process will be costly enough without the addition of charges for which there is no justification. Where no physical work is required there should be no charges other than the service order record simple charge. If SBC charges for work not done or imposes charges inconsistent with the interconnection agreement, the affected CLEC may object to that through the dispute resolution provisions in their respective interconnection agreements. Further, the Commission finds that a port disconnect fee is not appropriate when transitioning off of UNE-P to a UNE-L for this transition period.

Issue 9. Post Transition Period Rates for ULS or UNE-P

The parties dispute the appropriate charge for ULS or UNE-P if the CLECs fail to submit orders to transition their respective embedded base of ULS/UNE-P customers to an alternative serving arrangement in a timely manner.[7] SBC has proposed that it charge market-based rates, which it defines as the Local Wholesale Complete™ rate, which it argues is available in the market and is service closest to the UNEP.

SBC argues that the Joint CLECs' position, that SBC should convert lines for which the CLEC has failed to request alternative arrangements to "Total

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[7] Language to which the parties have agreed states that a delay in transfer past the end of the transition period caused by SBC will result in a price for ULS or UNE-P in the pricing schedule plus $1.00.

Service Resale" rates, is not appropriate. First, SBC argues that, as the wrongdoer, the CLEC should not be permitted to choose its own consequences. If the CLEC desires to convert its embedded customer base to resale, it is free to do so, submitting the necessary orders to accomplish that before the end of the transition period. Second, SBC argues, the Joint CLECs' proposal is unworkable. SBC states that it cannot convert all of the features on a UNE-P account to a resold account, because resold lines can only contain those offerings or features that SBC offers on a retail basis. CLECs may offer features to their retail customers that SBC does not offer, and are thus not available on a resold basis. SBC asserts that its market-based UNE-P replacement alternative does not have this problem.

The Joint CLECs argue that SBC's proposal would allow the company to unilaterally implement "market pricing" - an ambiguous term that creates risk and uncertainty in business planning. They argue that the FCC balanced the economic impact of the transition for CLECs and ILECs and created economic impacts that would be predictable and unaffected by gamesmanship on either side. The Joint CLECs contend that their proposed language is consistent with the FCC's objectives as well as public policy.

The Joint CLECs state that if, for whatever reason, a CLEC's embedded base of ULS/UNE-P arrangements have not been fully migrated to alternative arrangements or disconnected at the end of the 12-month transition period, SBC should restate those in-place arrangements at Total Service Resale, the retail price of the service minus the wholesale avoided cost discount, rather than market-based rates that SBC proposes. The Joint CLECs argue that it is appropriate to reject the market-based pricing because it is SBC that implements the final steps necessary to complete the migration of the CLEC's customers to an alternative service arrangement. They argue that providing SBC an economic reward for not completing a migration in a timely fashion provides the wrong incentives.

Moreover, the Joint CLECs argue, because there is no market for UNE-P or mass market ULS, the concept of a market-based rate is fiction. Thus, adopting SBC's proposal, the Joint CLECs argue, would adopt an unknown rate based on a non-existent market. In fact, the Joint CLECs argue, SBC has not proposed a rate, while the resale rate has been established by the Commission.

The Joint CLECs argue that their proposal will fully compensate SBC for the service provided. They argue that there is no dispute that the components of the service the customer receives before March 11, 2006 are the same service components the customer would receive on and after March 12, 2006, unless the customer is migrated to an alternative service arrangement. They argue that if SBC had completed the migration to resale service, it would be entitled only to the resale rate established by the Commission.

The Commission finds that the parties should diligently work to achieve the transition required by the FCC's orders on time. To that end, the Commission directs all CLECs to provide SBC with a transition plan no later than October 20, 2005. SBC shall file a report by November 21, 2005, listing the CLECs for which they have worked out a transition plan consensus. Unreasonable delay on any party's part may be considered a dispute that may be brought before the Commission after any interconnection agreement dispute resolution procedures have been completed. However, should the transition not be completed by the transition period end date, the Commission is persuaded that the process and billing proposed by

SBC should be implemented. SBC has every incentive to expeditiously transition the CLECs away from UNEs. Its language does not interfere with that incentive in the least. If SBC causes a delay past the end of the transition period, although the CLEC has submitted a timely order, a much lower rate will apply, as provided in the agreed language. If a CLEC fails to provide the required plan and to facilitate transition, SBC may charge that CLEC for local wholesale complete (LWC) at the end of the transition period should the transition not be completed on time.

Issue 10. Rates for Converted Loops During the Transition Period

The Joint CLECs proposed language for Section 2.1.4, which provides that, unless the CLEC requests or agrees otherwise, the FCC-established transition rate for UNE-P should apply to the CLEC's entire embedded base of UNE-P customers until the end of the transition period, even after those lines are converted to a new arrangement prior to the end of the transition period. In this manner, the Joint CLECs argue, the conflict between the CLEC's desire to retain the transition rate during the entire 12-month period and the ILEC's desire to begin the UNE-P transition sooner than the end of the transition period may be resolved. In the Joint CLECs' view, this proposal would support accomplishing an orderly transition envisioned by the FCC, because it would eliminate financial incentives for either party to push the limits.

The Joint CLECs argue that the FCC carefully delineated the functional from the financial aspects of the transition. By eliminating dysfunctional incentives on both sides, the Joint CLECs argue, the FCC promoted its goal of encouraging the parties to reach commercial agreements expeditiously.

Moreover, the Joint CLECs argue, the FCC's rules support the existence of a full 12-month transition period for rate purposes. They argue that in 47 CFR 51.391(d)(2)(ii) and (iii), the FCC broke the nexus between the operational and economic aspects of the transition, by the phrase ". . . notwithstanding paragraph (d)(2)(i) of this section . . . ." They argue that SBC's proposal to charge a different, higher rate for a functionally equivalent service arrangement prior to the end of the transition period is "directly at odds with" the FCC rule and the FCC's stated intent to foster an orderly transition process.

SBC argues that under the Joint CLECs' proposed Section 2.1.4, the FCC's prescribed transition rate for the embedded base of UNE-P/ULS would continue to apply through March 11, 2006, even if the transition to a different configuration should occur sooner, unless the CLEC requests otherwise. SBC takes the position that the Joint CLECs want to pick and choose what rates they pay after the "unlawful UNEP service has been discontinued." SBC brief, p. 26.

SBC points out that the FCC adopted a transition plan providing over a year to enable CLECs to move from ULS/UNE-P to alternative serving arrangements. It states that many CLECs have taken their obligations to transition seriously and have either already converted their embedded base to other arrangements or have plans in place to do so. It asserts that the FCC's intention was not to create an opportunity for CLECs to wait until March 10, 2006, before seeking to flash cut their UNE-P lines to other arrangements. Equally, SBC asserts, the FCC did not intend that the parties pretend that all conversions will take place on March 10, 2006 for purposes of applying rates, assuming that those conversions are to alternatives offered by SBC. In SBC's view, the Joint CLECs' proposal would disadvantage those CLECs that have already transitioned their customers to lawful serving arrangements and would "favor those CLECs who want to play games." SBC brief, p. 27. Moreover, SBC argues, the proposal would be impossible to administer and is inconsistent with the *TRRO* transition mechanism.

Additionally, SBC argues, the proposal would require SBC to bill different rates to a single CLEC for exactly the same offering. If a CLEC determined to transition its embedded customers to resale, for example, SBC would be charging that CLEC the UNEP transitional rate or the resale rate for the same services, dependent only upon whether the line was transitioned to resale rather than a new connection. SBC asserts that this proposal would require manual billing adjustments for every transitioned line.

The Commission is persuaded that SBC should continue charging CLECs the transition charge until the end of the transition period, once the CLEC has converted its lines to another service, unless other terms have been negotiated between those parties. The Commission emphasizes that it is in the interest of all industry participants to manage their affairs in such a manner as to contribute to the orderliness of the transition. The Commission finds that a balanced reading of the *TRRO* justifies the requirement proposed by the Joint CLECs. Therefore, the Commission concludes that the language proposed by the Joint CLECs should be adopted.

Issue 11. This issue has been resolved by the parties.

Issue 12. Limit on Obtaining DS1s as UNEs

The Joint CLECs state that the parties agree that CLECs are limited to 10 DS1 transport circuits on a route for which DS3 transport is not available, and to 12 DS3 transport circuits on any route. However, the Joint CLECs argue, SBC's language fails to restrict these limitations to wire centers where CLECs are deemed to be non-impaired without access to DS3 transport. They state that the intent of the limit on DS1s is to prevent a CLEC from evading the elimination of DS3 transport UNEs by ordering large numbers of DS1 circuits instead. They argue that where DS3 transport is available, there would be no rule to evade, and any CLEC request for DS1 circuits rather than DS3 circuits should be presumed legitimate. The Joint CLECs quote from paragraph 128 of the *TRRO* as follows:

> *Limitation on DS1 Transport.* On routes for which we determine that there is no unbundling obligation for DS3 transport, but for which impairment exists for DS1 transport, we limit the number of DS1 transport circuits that each carrier may obtain on that route to 10 circuits. This is consistent with the pricing efficiencies of aggregating traffic. While a DS3 circuit is capable of carrying 28 uncompressed DS1 channels, the record reveals that it is efficient for a carrier

> to aggregate traffic at approximately 10 DS1s. When a carrier aggregates sufficient traffic on DS1 facilities such that it effectively could use a DS3 facility, we find that our DS3 impairment conclusions should apply.

Id.

The Joint CLECs argue that paragraph 128 of the *TRRO* clarifies that the cap only applies when DS3 transport is not available as a UNE. It argues that notwithstanding the omission of that explanation in the FCC's rules, the FCC order has the force and effect of law, and the rules must be read in conjunction with the rest of the *TRRO*. It urges the Commission to adopt the position of the New York Public Service Commission on this issue and adopt the Joint CLECs' proposed language for Section 3.1.4.1.

SBC argues that the Joint CLECs' proposal is inconsistent with the TRRO and the FCC's rules. It states that 47 CFR 51.319(e)(2)(ii)(B) provides:

> A requesting telecommunications carrier may obtain a maximum of ten unbundled DS 1 dedicated transport circuits on each route where DS1 dedicated transport is available on an unbundled basis.

Id.

SBC argues that this cap is not dependent upon whether DS3 transport is available as a UNE. It states that the FCC determined that a CLEC should purchase DS3s or comparable facilities once it reaches the cap on DS1 circuits. SBC argues that the manner in which the DS3 facility is offered is irrelevant.

Furthermore, SBC argues, the Joint CLECs' proposal would permit a CLEC to obtain the DS3 from SBC at TELRIC rates, rather than access rates, whenever DS3 is available as a UNE. In SBC's view, the Joint CLECs' proposal would lead to subversion of the FCC's non-impairment determinations by allowing a CLEC to order an unlimited number of DS1 transport circuits in order to avoid hitting the DS3 dedicated interoffice transport cap.

The Commission finds that SBC has the more persuasive argument. In the Commission's view, the Joint CLECs' argument ignores the meaning of the last sentence of paragraph 128 of the *TRRO*, and fails to take into account ¶ 181 and fn 489 of the *TRRO*. When DS3s are available, the CLEC may not purchase more than ten DS1s. DS3s are available for transport between wire centers of which one must be a Tier 3, the least competitive classification of wire center. If in the wire centers in which DS3s are available, a CLEC has traffic requiring more than ten DS1s, it may efficiently employ DS3 transport. Therefore, the Commission concludes that the provisions of 47 CFR 51.319(e)(ii)(B) are consistent with the discussion in the *TRRO* on this issue, without the Commission inserting additional, limiting language as suggested by the Joint CLECs.

Therefore, the Commission finds that the Joint CLECs' proposed language should be rejected for Section 3.1.4.1.

Issue 13. Charges to Transition the Embedded Base of High Capacity Loops.

SBC points out that this dispute is essentially the same as the dispute in Issue 8, addressed earlier. The Joint CLECs state that this issue is essentially the same as Issue 29. The Commission finds that this issue is similar to both Issues 8 and 29, and concludes that these issues should be resolved consistently with one another. In Issue 8, the Commission adopted the Joint CLECs' proposed language, and admonished SBC not to impose charges for work that is not necessary to complete the conversion. As noted by the FCC, much of the change is merely a billing function. The language proposed by the Joint CLECs is adopted.

Issue 14. Updating List of Non-Impaired Wire Centers

SBC proposes language for Section 4.1.1.1 that SBC contends will permit it to update the list of non-impaired wire centers as relevant changes occur. It argues that the Commission should reject the Joint CLECs' proposal to limit SBC's ability to update to once every six months. SBC argues that the only purpose served by the Joint CLECs' proposal is to prevent SBC from obtaining relief to which it is entitled under federal law.

Moreover, SBC argues, as a practical matter, SBC cannot update its non-impaired wire center list based on business line counts more frequently than once annually, because the business line counts depend upon ARMIS 43-08 data that is only produced on an annual basis. On the other hand, SBC states, the count of fiber-based collocators may change more frequently, and, it argues, there is no basis to prevent SBC from reflecting those new collocators. It states that given the cost to update the fiber-based collocator counts, SBC would not likely perform this more frequently than once per quarter.

SBC complains that an arbitrary six-month limitation would enable CLECs to game the system by turning up new fiber-based collocations immediately after an update in order to obtain an additional six months of access to unbundled high capacity circuits to which they should not be entitled.

The Joint CLECs argue that the *TRRO* did not discuss a time frame for additional wire center updates. They contend that it is important that the updates occur in a structured manner so as not to unduly disrupt end users and to permit CLECs to develop and follow business plans in an appropriate manner.

The Commission finds that the Joint CLECs' proposed language should be adopted. There is no requirement in the *TRRO* concerning this issue, but as SBC has conceded that it would not be updating the list any more frequently than once per quarter, the Commission finds that once in a six-month period should be not be unduly burdensome to the ILEC. The Commission is not persuaded that the tactics SBC envisions are likely to occur. Certainly, there are more important factors for considering when to implement a fiber-based collocation than when the last update to the count was done.

Issue 15. Issue 15 has been resolved by the parties.

Issue 16. Time Limits on Self-Certification

SBC states that Sections 4.1.1.4, 4.1.1.6, and 4.1.1.0 address the process by which impairment decisions are made with respect to any wire center that may be currently listed as impaired, but may become unimpaired. It states that the FCC was silent as to the process by which future additions to the list of unimpaired wire centers should be accomplished.

SBC argues that it has proposed a straightforward process that begins with its notifying CLECs of additional designations of unimpaired wire centers by Accessible Letter and by posting on line. For the next 30 days, SBC states, it will continue to accept and process orders for the affected high capacity loops or transport even without CLEC self-certification. Its proposal further provides CLECs 60 days after issuance of the Accessible Letter to self-certify that it is entitled to obtain the affected loops or transport as a UNE. If it does not self-certify, the CLEC will be required to transition the affected high capacity loops or transport. If the CLEC does self-certify within 60 days, the parties will follow the dispute resolution process set forth in the Commission's March 29, 2005 order.

In contrast, SBC argues, the Joint CLECs' proposed language would impose no time limits on their ability to self-certify. Because, SBC argues, any CLEC self-certification would effectively permit all CLECs to order high capacity circuits in that wire center, the possibilities for abuse are obvious. This is particularly evident, SBC argues, in the self-certifications that were later withdrawn without the Commission having an opportunity to rule on the issue. SBC argues that such a provision would result in a complete frustration of the self-certification process.

The Joint CLECs argue that the FCC did not limit when self-certification should be provided by the CLEC. They contend that a CLEC may have a valid business reason to self-certify only at some time after 60 days from issuance of the Accessible Letter.

The Joint CLECs further contend that SBC will not be prejudiced by permitting self-certifications more than 60 days after the issuance of an Accessible Letter. They state that if a CLEC does not self-certify within 60 days, the CLEC would have to transition the circuits it then has off of UNEs, regardless of a subsequent self-certification. However, a CLEC might still self-certify for new loop and transport orders in a wire center for which SBC had issued an Accessible Letter more than 60 days prior. In this manner, the Joint CLECs argue, the Commission will preserve a CLEC's ability to self-certify at a later date, when it might have a business reason sufficiently significant to justify the time and expense of self-certification and defending SBC's challenges to that self-certification. Moreover, the Joint CLECs point out that such later self-certifications would be available only for wire centers for which the Commission has not made a prior determination that the wire center is unimpaired.

Finally, the Joint CLECs argue that the Commission should adopt their proposal because it would prevent unnecessary litigation that will arise should the CLECs be forced to litigate matters where their present business needs do not economically justify the resources necessary to do so.

The Commission is persuaded that there should be no express time period after which a CLEC may not challenge the ILEC's designation of a wire center as unimpaired by self-certification. To establish such a deadline would encourage the ILEC to designate wire centers as unimpaired prior to there being significant activity within the wire center. Without significant activity, there is small likelihood that a CLEC would consider spending the time or resources to challenge the designation. Should the abuse of process that SBC fears occur, SBC could object to granting the withdrawal and dismissing the proceeding. At that juncture, the Commission could choose not to permit the withdrawal of the issue of whether a particular wire center is unimpaired. Thus, SBC need not be unduly prejudiced by this resolution.

Moreover, the Commission notes the Joint CLECs' assertion that SBC will not endure the negative results it fears because when a CLEC has failed to self-certify within 60 days, it must transition its lines away from UNEs despite any future self-certification. The Joint CLECs do not cite the language that they believe requires this result, but the Commission agrees that that result should occur. The parties are directed to include language that reflects the Joint CLECs' assertions in this respect.

Issue 17. Transition Time for Subsequent Unimpaired Designations

This issue concerns the appropriate amount of time within which a CLEC must transition from UNEs to other arrangements once a wire center has been designated as unimpaired and the period for self-certification has expired without any CLEC submitting a self-certification to obtain high capacity loops and transport. The resolution of this issue will determine the appropriate language for Section 4.1.1.5.

SBC proposes that CLECs have 90 days after SBC designates an office as unimpaired (assuming no self-certification is made). In contrast, the Joint CLECs propose 12 months for high capacity loops and DS1 and DS3 dedicated transport and 18 months for dark fiber dedicated transport.

SBC argues that the Joint CLECs' proposal violates the *TRRO* and maintains that there is no rational basis for allowing CLECs to continue to purchase high capacity loops and transport as UNEs for up to 18 months after a determination that they are not impaired without access to such loops and transport. SBC argues that CLECs have alternative means to serve their customers, including access services. In SBC's view, the CLECs should not be entitled to the lengthy periods adopted by the FCC for post transitional period designations. SBC argues that these later determinations will not create the same "significant changes to the regulatory framework for high capacity loops and dedicated transport," because the CLECs have now had ample notice of the coming change. SBC brief p. 33.

The Joint CLECs take the position that the FCC's analysis and conclusions in the *TRRO* should apply to any subsequent wire center designation to support setting 12- and 18-month time frames for transitioning off UNEs in a newly designated wire center. They argue that the FCC determined that "the twelve-month period provides adequate time for both [CLECs] and [ILECs] to perform the tasks necessary to an orderly transition, including decisions concerning where to deploy, purchase, or lease facilities." *TRRO*, ¶ 144.

The Joint CLECs argue that SBC has not presented any reason to justify its proposed greatly shortened transition time frame. In fact, the Joint CLECs argue, they still consider the FCC's time line to be too short, but are willing to compromise to offer its proposed contract term. Moreover, they argue that they have offered to pay a 15% increase for UNEs during the transition period to mirror the transition terms imposed by the FCC in the *TRRO*. They contend that the FCC has repeatedly found that sufficient transition periods are necessary to avoid "flash cuts," which are disruptive to carriers and their customers. They insist that the 12- to 18-month time periods are necessary, because the CLECs will have to make the same types of adjustments when loop and transport UNEs are eliminated in the future as they do for the current transition. They note that the work that must be performed to self provide or lease facilities are the same as for wire centers that were the subject of the *TRRO*. The Joint CLECs state that weather uncertainties and unforeseen delays in available facilities make it hard to believe that conversions for multiple CLECs in a given office, can take place 30 days from the end of a 60-day notice period as SBC proposes.

The Commission is persuaded that the Joint CLECs' proposed language should be adopted after modification to provide 9 months for transitioning high capacity loops and transport and 12 months for transitioning dark fiber transport. In the Commission's view, this renders the Joint CLECs' proposal reasonable.

The Commission finds that SBC's proposal is not reasonable, because it creates a time frame that is too tight for conducting an orderly transition away from UNEs. Further, although the Joint CLECs state in their brief that they are willing to pay a 15% increase during the transition period, they do not cite the contract language that would include that offer. The Commission finds that the parties should agree on language that will provide for the CLECs to pay a 15% surcharge on those services during the transition period. Moreover, the Commission finds that the parties should develop language to which they can agree that does not require SBC to provision new (not ordered prior to the transition period) high capacity loops and transport or dark fiber transport during the transition period. The language proposed by the Joint CLECs appears ambiguous.

Issue 18. Transition for High Capacity Loops and Transport

SBC argues that the language proposed by the Joint CLECs suggests that SBC may not charge for cross connects until the date of conversion of the high capacity loop. The Joint CLECs argue that their proposed language is intended to require minimizing the disruption to customers during the transition. SBC says it will minimize disruption to customers without the Joint CLECs' language. The arguments in the parties' briefs seem to miss each other.

In their reply brief, the Joint CLECs argue that if SBC's reading of the agreed to language in Section 4.3 is consistent with SBC's statement on page 35 of its brief, then the Joint CLECs no longer insist on their chosen wording.

The Commission concludes that the language proposed by SBC should be adopted, with the understanding that the contract language will not be interpreted in a manner inconsistent with SBC's statement on page 35 of its brief in this case.

Issue 19. Redundancy

In certain circumstances, customers desire redundant facilities for the sake of reliability. The dispute in this issue is how to price the facilities for service to a building served by two wire centers, only one of which is impaired, when the building is physically located in the serving area of the unimpaired wire center.

SBC argues that its proposed language actually imposes obligations on SBC beyond those required by the current unbundling rules. SBC cites the requirement that it must provide unbundled "access to DS1 and DS3 loops 'to any building not served by a wire center' meeting the FCC's non-impairment thresholds." SBC brief, p. 35. Thus, SBC reasons, it is not required to provide such access to any building that is served by a wire center that meets the applicable standard for an unimpaired wire center, despite whether that building is served by another wire center as well. SBC states that it offered to permit CLECs to obtain unbundled access to DS1 or DS3 loops to any building that is physically located in the serving area of an impaired wire center. SBC states that although its offer goes beyond the strict requirements of the rules, SBC believed it to be consistent with the intent of the rules and with the FCC's loop impairment determinations, which are based in part on the likelihood that fiber facilities will be deployed in a geographic area served by a particular wire center.

However, SBC argues, the Joint CLECs' proposed language is contrary to both the rules and the loop impairment analysis in the TRRO. It argues that the FCC has determined that CLECs are not impaired without access to high capacity loops when a building is served by a wire center that is not impaired.

The Joint CLECs argue that their proposed language would permit a customer to retain redundant service when the building is located in a serving area of an unimpaired wire center, but is served using both an impaired and an unimpaired wire center.

The Commission finds that the language as proposed by SBC should be adopted for the interconnection amendment. The FCC's orders and the rules identify the serving wire center as the determinant for whether unbundled high capacity loops are available. The Commission approves of SBC's proposal to permit that access where the building is located in the serving area of the impaired wire center. However, it cannot and will not require SBC to provide unbundled high capacity loops to a building located in the serving area of the unimpaired wire center. Contrary to the Joint CLECs' assertions in its reply brief, this finding does not prevent customers from obtaining redundancy, although it may affect the method and cost for the CLEC to provide it.

Issue 20. Advance Notice for Wire Centers Approaching FCC Thresholds

The Joint CLECs propose language for Section 4.8 that would require SBC to post on a quarterly basis information advising when it believes a wire center has reached 90% of the number of business lines needed for the wire center to be classified as a Tier 1 or Tier 2 wire center, and to specify which wire centers it considers to have 2 or 3 fiber collocators. The Joint CLECs argue that because SBC certainly keeps track of this information, it is reasonable for SBC to share the information with CLECs for planning purposes.

SBC argues that the Joint CLECs' proposed language would impose a significant and impossible burden on SBC, and would require SBC to divulge highly confidential, competitively sensitive information. Moreover, SBC argues, it cannot provide business line information on a quarterly basis because it uses AR-MIS data that is available on an annual basis.

Moreover, SBC argues, it incurred significant expense to physically inspect wire centers to determine the locations that met the FCC's threshold for non-impairment. It did not inspect all of its wire centers, only those that it believed were substantially likely to meet that threshold. SBC states that it has not performed the work necessary to determine the number of fiber-based collocators present in each wire center. Thus, it argues, the Joint CLECs would require a substantial amount of work without any offer to compensate SBC for its trouble.

The Commission is not persuaded that the Joint CLECs' proposed language should be adopted. There is no requirement that SBC provide this information, it does not have the information on the timing that the Joint CLECs seek, and SBC should not be required to gather it without compensation to support the planning activities of the CLECs. Moreover, the result reached on Issue 17 should provide the CLECs with sufficient time to deal with newly declared unimpaired wire centers.

Issue 21. Commingling

The Joint CLECs proposed language for Section 5.1 that would require SBC to provide a commingling arrangement if SBC or any "SBC RBOC"[8] affiliate provides the commingled arrangement to a CLEC anywhere in the United States. The Joint CLECs argue that if an SBC affiliate provides a particular commingled arrangement, that would demonstrate the technical feasibility of that arrangement, and

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[8] RBOC refers to "regional Bell operating company."

Michigan CLECs should be able to purchase the same.[9]

The Joint CLECs argue that SBC has provided similar lists of available commingled arrangements in states such as Texas and Missouri. Also, the Joint CLECs assert, SBC has indicated its desire to use the Michigan baseline document as a baseline for negotiations and discussions in Illinois and Ohio. Thus, they argue, SBC is capable of having processes or developing similar processes across its RBOC operating areas. In its reply brief, the Joint CLECs state that any SBC claim to differences between RBOCs is not based on any testimony and is, therefore, unfounded and speculative.

The Joint CLECs argue that if their proposed language is not approved, they will be required to use the bona fide request (BFR) process, which they argue is time-consuming and expensive, in situations in which BFRs should not be needed. Unnecessary use of the BFR process, they argue, will increase costs for CLECs and impose time barriers, both of which will impede competition.

SBC argues that commingling is available in instances where a CLEC wishes to connect a UNE with a facility or service that SBC offers at wholesale. In SBC's view, the Joint CLECs' proposed language would require SBC to offer commingling even if SBC does not offer the particular facility or service that the CLEC wishes to commingle. SBC asserts that there can be no duty to offer commingling if SBC does not offer the wholesale service that a CLEC seeks to commingle.

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[9] Commingling refers to instances in which a CLEC wishes to connect a UNE or combination of UNEs with a facility or service that SBC offers at wholesale.

The Commission is not persuaded that the Joint CLECs' position must be adopted. In its reply brief, SBC states it initially announced the available processes for commingling that were consistent across all of the states in the Midwest region (Illinois, Indiana, Michigan, Ohio, and Wisconsin). However, there were regional differences between the processes that were available because those processes had to account for the regional differences between the various SBC affiliates. SBC commits that it will not develop a process that supports offerings available to CLECs in Michigan and declines to offer it to Michigan CLECs. Additionally, should SBC fail to honor that commitment, the CLECs may challenge a refusal in an appropriate case. Therefore, the Commission finds that SBC should be able to provide in Michigan any commingling available within SBC's midwest region, consistent with the ILEC's own assertion. The parties shall include language to reflect this finding.

Issue 22. Special Access Tariffs a. Termination Penalties

The dispute for this issue manifests itself in the Joint CLECs' proposed language for Sections 4.9 and 5.8 of the amendment. The Joint CLECs note that for situations in which a CLEC is forced off of DS 1 and DS3 high capacity loops, a CLEC may incur early termination penalties for disconnecting related special access or collocation arrangements that are no longer useful without the high capacity loops. They argue that any termination penalties SBC may impose on the disconnecting CLEC in such a situation must be limited to a reasonable amount. In

Section 4.9, the Joint CLECs propose language that limits any early termination penalty to the price differential between the tariff term and the actual term of the service or facility, except for special construction collocation and transport.[10] In the Joint CLECs' view, this proposal is a compromise between no termination penalties and the penalties that might be imposed pursuant to tariff provisions.

SBC argues that the Joint CLECs have proposed abrogating SBC's rights under tariff and contract for access services by eliminating or reducing termination liabilities under those agreements or tariffs in the event a wire center is determined to be non-impaired for high capacity loops or transport. Further, SBC argues that this proceeding is to resolve interconnection disputes arising out of Section 251 and Section 252 of the federal Act, the *TRO*, the *TRRO*, and related FCC orders. In SBC's view, there is no basis to interject into this proceeding issues concerning services that are provided under SBC's tariffs or contracts for access services. It explains that SBC's access tariffs mirror its federal tariffs. Thus, SBC argues, the Joint CLECs are attempting by arbitrated contract to alter the ILEC's federal access tariffs. SBC argues that the Commission has no authority to grant the CLECs' request. Moreover, SBC argues, the Commission has no authority to modify contractual termination charges arising out of term contracts for interstate access service.

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[10] For example, the CLECs state, if the tariff term is 48 months, was billed at $300 per month, the circuit was working for 24 months, and the 24 - month rate is $200 per month, the CLEC would pay $2400 (months remaining times rate for shorter period). Any partial months would be paid at the lower tier rate.

Furthermore, SBC argues, the Joint CLECs' proposal is effectively a collateral challenge to the Commission's June 26, 2004 order in Cases Nos. U-13977 and U-14175. SBC further states that Section 310 of the Michigan Telecommunications Act (MTA), MCL 484.2310 permits the parties to enter into arrangements that differ from the tariffs. If the parties cannot agree, SBC argues, an application must be filed pursuant to Section 204 of the MTA, MCL 484.2204, which has not happened in this case.

In its reply brief, SBC responds to the Joint CLECs' argument that SBC is the cause of the wasted facilities, and therefore, should not be permitted to profit from early termination penalties. SBC argues that the Joint CLECs' position is absurd. In SBC's view, the federal Act imposed on SBC the obligation to provide UNEs. What is actually required under the act has been litigated by many parties, determined by the FCC, and adjusted in the courts. SBC argues that the CLECs were aware of the possibility that the FCC would determine that CLECs are not impaired without access to certain UNEs when they made the business decision to enter into long term agreements, and receive the consequent benefits. SBC asserts that there is no factual or legal basis for the Commission to void those contractual commitments. Moreover, to permit CLECs to avoid the consequences of their decision to enter into long term agreements, would discriminate against every other CLEC that did not agree to a longer term in order to minimize their potential exposure.

The Commission concludes that it should adopt SBC's position on this issue. Special access is not a service generally covered by interconnection agreements, because it is not required or provided pursuant to 47 USC 251(c)(3). Further, the Commission is not aware of any FCC determination that CLECs should be relieved of contract terms for special access, based on the changes wrought to the industry in the *TRO* and the *TRRO*. If a CLEC needs assistance with obtaining agreeable terms for access services, they may pursue that desire using the appropriate channels. However, the Commission is not in a position to void long term contractual commitments the CLECs made. Therefore, the Commission rejects the language proposed by the Joint CLECs on this issue.

b. Notice of Access Tariff Changes

In Section 5.8 of the amendment, the Joint CLECs propose additional language that would require SBC to provide 60 days' prior notice of any proposed change to its access tariffs that eliminates the availability of a product "that would restrict or impact the availability or provisioning of commingled arrangements under this attachment or the Agreement." Section 5.8. The Joint CLECs seek to add to that requirement a requirement that SBC "grandfather in place commingled arrangements that have been ordered prior to the access tariff effective date." *Id.*

SBC's brief argument references its response to the Joint CLECs' proposal for Section 4.9, and essentially relies upon its argument that the Michigan tariffs mirror the FCC tariffs in all respects. In its reply brief, however, SBC argues that the CLECs should receive the same notice that every other access customer receives in accordance with the FCC's rules and SBC's federal access tariffs. It argues that the Joint CLECs' request for preferential treatment is discriminatory and beyond the scope of this proceeding. It notes that all customers using an access service would be affected if it were phased out, not just a CLEC.

The Commission is persuaded that SBC's position should prevail on this issue for the same reasons that the Commission reached its conclusion in subsection a. of this issue.

Issue 23. Audit Procedures-Challenge

In order to obtain certain elements and combinations of elements, a CLEC must self-certify that it meets the appropriate criteria to obtain those elements. To police the self-certification, the ILEC has the right to employ an independent auditor. In Section 6.3.8.4 of the amendment, the parties dispute whether the CLECs should pay disputed amounts into escrow if an auditor determines that a CLEC is not in compliance and the CLEC disagrees with the conclusions of an auditor's report.

The Joint CLECs propose that the parties should resolve disputes concerning the auditor's report, without requiring the CLEC to pay the disputed amount, until the Commission has had an opportunity to rule on the issue.

In their brief, the Joint CLECs state that no payment should be required until after a decision approving the audit result. They state that without the ability to withhold payment pending dispute resolution, the financial responsibility for invalid charges would rest upon the disputing party, which they say is contrary to the underlying interconnection agreements. They argue that no automatic payment should be required, but rather the actual damages provisions of the underlying interconnection agreement should control.

SBC takes the position that there is no basis for withholding payment once an independent auditor has determined noncompliance, even if the affected CLEC disputes the findings. It argues that noncompliance is a matter of the CLEC's misrepresentation as to its eligibility to obtain the EEL. Further, the noncompliance has not been voluntarily disclosed as inadvertent error, but has been discovered through an audit, initially paid for by SBC.

SBC argues in its reply brief that whatever the merits of permitting a CLEC to withhold payment pending a dispute, there is no basis for doing so once an independent auditor has determined noncompliance. That this places certain financial responsibility on the disputing party is, in SBC's view, appropriate and a common manner of handling a billing dispute.

The Commission is persuaded that the SBC's proposed language should be adopted for Section 6.3.8.4. At the point of an independent auditor's determination of noncompliance, SBC has already invested significant resources into determining noncompliance. It appears to the Commission that payment of disputed amounts into escrow is a reasonable method to ensure prompt payment upon Commission determination.

Issue 24. Audit Procedures-Reimbursement

In Section 6.3.8.5, the disputed language relates to when and how much of the audit costs the CLECs must pay SBC if the CLEC has been found to have falsely self-certified its eligibility for EELs. SBC proposes that if the CLEC is found to have 10% or more of the circuits investigated noncompliant with FCC requirements, it must pay 100% of the audit costs. If noncompliance is limited to less than 10%, SBC would have the CLEC reimburse the ILEC in an amount that is in direct proportion to the number of circuits found to be noncompliant.

The Joint CLECs, on the other hand, would prefer to reimburse SBC for audits only to the extent (pro-rata) that their circuits are found to be noncompliant, as compared to the total number of all circuits leased by the CLEC which were the subject of the audit.

The Commission finds that the language as proposed by SBC should be adopted for this provision. In the Commission's view, it is a CLEC's responsibility to ensure that its circuits are in compliance with the FCC's requirements. Failure at a level of 10% or more justifies SBC's concerns and should require the CLEC to pay for the audit. A level of less than 10% failure should not result in 100% payment, but payment of costs in relation to the number of circuits found to be noncompliant, as SBC's language provides.

Issue 25 and 26. These issues have been resolved by the parties.

Issue 27. Cost Recovery for Routine Network Modifications

Routine network modifications are those modifications that SBC regularly undertakes for its own customers. SBC argues that those activities are only required where the loop or transport facility has already been constructed. Thus, SBC asserts, routine network modifications do not include the construction of new facilities, such as trenching or placing new aerial or buried cable or constructing new manholes, conduits, or terminal, or obtaining new rights of way for a requesting carrier.

SBC argues that its proposed language will permit it to impose charges for routine network modifications at the rates, terms, and conditions in the agreement's pricing schedule in instances where such charges are not included in the Commission's approved TELRIC-based recurring or nonrecurring charges. SBC argues that in its current nonrecurring charges, it does not recover costs of (1) adding an equipment base, (2) adding a doubler or repeater, including associated line cards, and (3) installing a repeater shelf, to the extent such equipment is not present on the loop or transport facility when ordered.

SBC argues that the Joint CLECs' proposal would not permit SBC to impose any charge for routine network modifications until such time as the Commission specifically authorized a charge, presumably after a contested case hearing.

The Joint CLECs argue that SBC's proposed language generally assumes that costs it will incur in undertaking routine network modifications on behalf of a CLEC are not recovered in the monthly recurring or nonrecurring charges already approved by the Commission in Case No. U-13531 for UNEs. SBC proposes to impose charges for these modifications on an individual case basis. The Joint CLECs state that, on the other hand, their proposed language assumes that because these network modifications are by definition routine, the network maintenance and rearrangement expenses are already recovered by SBC in the monthly recurring rates it assesses for UNEs. Thus, they argue, there is no need for further charges.

The Joint CLECs acknowledge that it is difficult to envision all potential routine network modifications and state that "it is possible that some rare modification will require activities or materials other than those already accounted for in SBC's TELRIC-based rates."Joint CLECs brief, p. 76. The Joint CLECs argue that they, therefore, included the option to further negotiate, or arbitrate, rates for those circumstances in which SBC believes its costs will not be recovered. The Joint CLECs state that their proposed language is intended to permit SBC to recover its costs, but prevent it from double recovery.

Moreover, the Joint CLECs argue, in previous Commission orders addressing like arguments, the Commission has found that the costs for which SBC sought to impose additional charges were already included in the approved nonrecurring and recurring charges, without need to impose additional charges. Further, the Joint CLECs state, the Commission determined that if there were any costs that were not likely to be recovered, SBC should pursue altering its methodology for its cost studies to include those unrecovered costs. The Joint CLECs go on to state that in the *TRO*, the FCC indicated that the Commission had taken the right approach.

The Joint CLECs further argue that SBC identifies three specific network modifications that it believes will require additional charges. Those activities, the Joint CLECs argue, are either routinely undertaken in the construction of a loop or transport circuit, with associated materials; is equipment routinely added to existing network infrastructure, with associated expenses recovered in maintenance or other expense factor in the annual charge factors, or recovered as a result of some other comparable equipment given that SBC's forward looking design assumed in the TELRIC studies may rely upon a technology that does not require this specific equipment. Therefore, the Joint CLECs argue, permitting SBC to impose additional charges would permit it to double-recover its costs, which the FCC prohibits. *TRO*, ¶ 640.

The Commission finds that the language proposed by the Joint CLECs should be adopted for this issue. The costs for which SBC seeks to impose additional charges should be recovered through the charges approved in Case No. U-13531. If the charges approved in that case do not sufficiently recover SBC's costs, it may seek modification of its cost studies in an appropriate case. SBC is not permitted to unilaterally establish charges for costs that it asserts must be recovered for UNEs. The Commission notes that the record was not closed until after the *TRO* was issued, after which the Commission specifically invited SBC to modify its cost studies if necessary in light of that FCC decision. SBC chose not to modify its cost studies. The Commission will not now permit SBC to circumvent Commission review and approval of costs that should be included in the approved cost studies. The Commission has repeatedly stated that an arbitration proceeding is not the appropriate forum for review of cost studies. This proceeding has evolved into an arbitration proceeding, and fits within the rule.

Issue 28. Batch Hot Cuts

The Joint CLECs propose as essential, the inclusion of terms and conditions for batch hot cuts in this amendment. They state that the proposed language was sent to SBC on June 10, 2005, updating the language proposed on May 31, 2005, to make it closer to the language and terms the Commission approved in its June 7, 2005 order in Case No. U-14463. Those revisions, the Joint CLECs state, include an increase in the rate for batch hot cuts.

The Joint CLECs argue that the provisions for batch hot cuts should be included in the interconnection agreement because the FCC based its *TRRO* ruling that CLECs are not impaired without local switching as a UNE on the availability of batch hot cut processes. They state that the FCC recognized that the states could further refine these processes. They further argue that United States District Court Judge Marianne O. Battani's January 6, 2005 order in *Michigan Bell v Lark et al*, United States District Court for the Eastern District of Michigan, Southern Division, Case No. 04-60128 (*Batch Order*), should not prevent the Commission from arbitrating batch hot cut provisions for this amendment. In that order Judge Battani enjoined the Commission from enforcing its order in Case No. U-13891, related to batch hot cuts.

Unlike the situation in the *Batch Order*, the Joint CLECs argue, the FCC has now made the determinations concerning impairment, and no impairment determinations have been impermissibly left to the states to consider. In the Joint CLECs' view, the Commission now has ample authority to address the batch hot cut issues without seeking to enforce the enjoined order in Case No. U-13891.

The Joint CLECs argue that because batch hot cuts are required under 47 USC 251 and 271, it is appropriate that terms and conditions for providing batch hot cuts be made a part of the interconnection agreement. Otherwise, the Joint CLECs argue, SBC will argue that it has no obligation to provide batch hot cuts. Moreover, the Joint CLECs claim that SBC has a duty to provide batch hot cut processes beyond the current time of transition. In the Joint CLECs' view, this is an appropriate proceeding to address the terms and conditions with respect to an amendment for batch hot cuts. Because the Joint CLECs have proposed the only language for batch hot cuts, they argue that the Commission must adopt their proposed language and incorporate it into the amendment.

SBC argues that issues surrounding batch hot cut arrangements are already being addressed in Case No. U-14463.SBC points out that in the March 29, 2005 order in that case, the Commission directed that all filings and actions regarding hot cuts should be determined in Case No. U-14463.To interject hot cut issues into this proceeding, SBC argues, would be counterproductive, waste resources of the Commission and the parties, and would call into question the Commission's compliance with the *Batch Order*.

The Commission finds that it should not use this proceeding to make determinations concerning terms and conditions for batch hot cuts. Those issues are specifically relegated to being resolved in Case No. U-14463, which remains open for further mediations of hot cut issues. Therefore, the Commission adopts SBC's position on this issue and rejects the language proposed by the Joint CLECs on this issue.

Issue 29. Conversion Charges

This issue is resolved consistently with Issue 8 and 13. For the reasons stated in those issues, the Commission adopts the Joint CLECs' proposed language, and once again admonishes SBC concerning its charges.

Verizon Issues

On June 14, 2005, Verizon filed a submission concerning the joint disputed issues list. On June 24, 2005, replies to Verizon's submission were filed by TC3, TelNet, and XO. Thereafter, on June 30, 2005, Verizon filed a motion to strike the responses to its submission. By July 15, 2005, TelNet and XO had filed responses to Verizon's motion.

In its motion to strike, Verizon states that it supplied its proposed *TRO* amendment on October 26, 2004. Thereafter, Verizon states, the Commission ordered the parties to produce *TRO* amendments through a collaborative process. It notes that in the Commission's May 17, 2005 order, the Commission adopted a schedule that provided for parties to file their disputed issues list by May 31, 2005. On June 14, 2005, the parties were to file support for their positions, and on June 24, 2005, the parties could file responses to the positions of other parties. Verizon argues that the only permissible filing on June 24 were responses to other parties' June 14 statements in support of their positions on previously identified disputed issues. Further, Verizon states, TC3, XO, and TelNet were all parties to the collaborative that designed the process adopted by the Commission.

Verizon states that on May 31, the collaborative members filed their joint disputed issues list, choosing to propose changes only to SBC's proposed TRO amendment. No issues were filed concerning Verizon's proposed amendment. Verizon states that the Commission Staff (Staff) and Verizon repeatedly questioned whether these CLECs had any issues with Verizon's *TRO* amendment, with no responsive identification of any issues.

Now, Verizon argues, after the collaborative process is over, these CLECs want to derail Verizon's amendment. Verizon argues that the June 24 filings by the three CLECs do not respond to any material about any issue in the disputed issues list. As a result, Verizon argues, they must be stricken.

Verizon further states that TC3 correctly states that it is in the process of negotiating a TRO amendment with Verizon. However, Verizon states, TC3 omits the fact that Verizon has addressed TC3's desired change and that TC3 has simply not signed the revised amendment. Verizon suggests that perhaps TC3 wanted to stall to see if the collaborative process produced a better deal, but that explanation fails to identify any issue for the Commission to resolve.

Further, Verizon states, XO and TelNet argue that Verizon's amendment should not be adopted because Verizon never filed a baseline document. Verizon states that the argument makes no sense. Verizon affirms that it provided its proposed TRO amendment on October 26, 2004. The Commission order directing the filing of "a baseline document differentiating the language that has been agreed-upon, disputed language SBC proposes, and disputed language one or more of the [CLECs] want." May 17 order in Case No. *U-14447*, p. 3. Verizon asserts that before a baseline document can be created there must be issues or changes proposed to the amendment. However, Verizon states, there were no issues raised with respect to Verizon's proposed amendment, and thus, no baseline document needed to identify any disputes.

Verizon goes on to state that the reason XO opposes Verizon's amendment is the perception that it might affect negotiations in other states with Verizon affiliates. Verizon notes that XO raised no issues here because it has no issues with Verizon's amendment in Michigan.

As to TelNet, Verizon argues, the CLEC's opposition relates to Case No. U-13931, its arbitration proceeding with Verizon. Verizon alleges that TelNet hoped that a different amendment might be worked out for Verizon by the parties to the collaborative, so that it could substitute it for the amendment it negotiated with Verizon. But the collaborative did not propose any changes to Verizon's amendment. It states that Verizon stood ready to work on any proposals the collaborative made, but none were offered.

Verizon further states that it should not be faulted for failing to propose changes to SBC's amendment. That amendment applies, by its terms only to interconnection agreements with SBC.

Finally, SBC argues, none of these CLECs identify any particular issue to be addressed by changes to the Verizon amendment. Verizon states that the consensus of the collaborative was that no changes were required to Verizon's amendment, and no disputed language issues were raised for Commission resolution. Verizon asks the Commission to confirm that the collaborative made no changes to Verizon's amendment and adopt it as the product of the collaborative. However, if the Commission is reluctant to do so, Verizon requests that the Commission should find that there is no Verizon amendment as a result of the collaborative and permit Verizon to continue negotiating with CLECs that may still require one.

XO responds that Verizon's motion to strike should be denied because the June 24 filings were responsive to Verizon's June 14 filing and properly bring to light important issues for the Commission's consideration.

TelNet argues that the Commission should deny the motion to strike. It states that Verizon's motion misleads the Commission to believe that the parties in the collaborative agreed that there would be one TRO/TRRO amendment for SBC and another one for Verizon. TelNet argues that the Commission should not strike the CLECs' filings on that erroneous premise, which is supported by neither the filings in Case No. *U-14447* nor logic.

TelNet points out that Verizon's filing of an amendment on October 26, 2004, could not address the *TRRO*, which was not issued until February 4, 2005. TelNet states that in the Commission's March 29, 2005 order in Cases Nos. U-14303, U-14305, and U-14327, the Commission closed those dockets and directed interested parties to address the change of law resulting from the *TRO* and *TRRO* in the Case No. *U-14447* collaborative. Case No. U-14327 was the docket in which Verizon filed its proposed October 24, 2004 amendment. Given the Commission's direction in the March 29 order for the parties to create four amendments from which to choose, TelNet states, there can be no illusion that Verizon's amendment remained on the table. According to TelNet, Verizon did not offer an amendment as part of that collaborative.

Moreover, TelNet argues, Verizon was a participant in the Joint Status Report filed on May 10, 2005, in which the parties to the collaborative requested a change in procedure to include submission of a joint disputed issues list, not one list for each ILEC. Tel-Net states that because SBC was the only ILEC that placed amendment language on the table, there is a reference to SBC's language in the request for change of procedure.

Further, TelNet asserts that there is no indication in the Commission's May 17, 2005 order that the Commission had been advised or intended that separate amendments would be approved for Verizon and SBC. TelNet argues that there is no reason that the amendment that results from the collaborative should not be applied to Verizon. TelNet reasons that the *TRO* and *TRRO* requirements are the same for both. It states that the CLEC participating in the collaborative have very divergent business plans, more divergent, TelNet argues, than the business plans of SBC and Verizon. TelNet argues that Verizon's "sandbagging and silence" should not be permitted to derail the efforts of the parties to the collaborative.

TelNet asserts that Verizon's assertion that the Staff and Verizon repeatedly asked if anyone had issues with Verizon's amendment, is an overstatement. Tel-Net asserts its belief that the limited discussion of Verizon's amendment occurred prior to the Commission's March 29, 2005 order in Cases Nos. U-14303, U-14305, and U-14327, in which the Commission clarified its intent that the collaborative parties should address the *TRRO* in addition to the *TRO*. TelNet goes on to state that Verizon did not urge adoption of its October 26, 2004 proposed *TRO* amendment to the collaborative after March 29, 2005. From that point forward, TelNet states, the assumption was that the collaborative was addressing specific issues raised by the *TRO* and *TRRO*, and that these issues were not carrier specific. There were no issues raised specific to Verizon because there were no issues specific to Verizon. Rather, TelNet argues, the issues being raised in the collaborative were applicable to all ILECs and CLECs in the state. It states that the fact that SBC was the only ILEC commenting on these issues should not result in the *TRO* and *TRRO* issues being decided differently for Verizon.

Accordingly, TelNet argues, the Commission should not approve Verizon's outdated amendment that does not address the TRRO, but rather should apply the amendment that comes out of this collaborative to all ILECs and CLECs in the state.

TelNet states that although Verizon submitted its proposed amendment in a timely fashion for submission of a joint disputed issues list, the Commission should not deem that filing to be a request for approval, as the document itself did not expressly request such approval. Moreover, XO argues, Verizon never submitted its proposed amendment for consideration by the collaborative. During the collaborative sessions, XO states, Verizon never objected to language in the baseline amendment and never expressed disagreement with any of the language contained in that baseline agreement.

It appears to the Commission that, at best, there has been a fundamental misunderstanding between Verizon and the CLECs. It appears that Verizon believed that the CLECs had no problem with Verizon's proposed amendment (its October 2004 version) and the CLECs believed that Verizon would be held to whatever the collaborative agreed to with SBC.

The Commission is not persuaded that it should impose on Verizon an amendment that was drafted with the relationship between the CLECs and SBC in mind. The language of the amendment approved today specifically refers to SBC providing facilities or billing customers, etc. Verizon is not mentioned in the amendment and the more generic term ILEC also was not used. Therefore, imposing the amendment approved for use with SBC's interconnection agreements on Verizon's interconnection agreements would present some problems.

However, the Commission is likewise unwilling to impose Verizon's proposed amendment on the CLECs who believed that they were negotiating in the collaborative for both agreements with both ILECs.

Therefore, the Commission finds that it should construct an abbreviated process for the parties to work out an amendment that can satisfy as nearly as possible, all concerned. The abbreviated process is justified because the Commission has now ruled on many issues related to the *TRO* and *TRRO*, which should make agreement easier. The Commission is not likely to reject what it has already approved or approve what it has already rejected. The Commission directs the parties to schedule collaborative meetings with the Director of the Commission's Telecommunications Division, Orjiakor Isiogu, to negotiate provisions to bring their interconnection agreements into compliance with the requirements of the *TRO* and the *TRRO*. Those meetings should begin immediately. Within 60 days, the parties shall submit to the Commission either a joint application for approval of an amendment in the docket for their respective interconnection agreements, or a double red-lined version of an amendment, with supporting briefs and documentation. If the submission is the latter, the Commission will determine which of the competing language should be approved in baseball-style arbitration.

The Commission FINDS that:

a. Jurisdiction is pursuant to 1991 PA 179, as amended, MCL 484.2101 *et seq.*; the Communications Act of 1934, as amended by the Telecommunications Act of 1996, 47 USC 151 *et seq.*; 1969 PA 306, as amended, MCL 24.201 *et seq.*; and the Commission's Rules of Practice and Procedure, as amended, 1999 AC, R 460.17101 *et seq.*

b. The interconnection agreements between SBC and the CLECs operating in Michigan should be amended as provided in this order.

c. Within 30 days of the date of this order, the parties shall submit fully executed copies of the amendment that complies with the findings of this order.

d. The parties should agree to and follow an orderly process for transition as described in this order.

e. Verizon should be permitted to negotiate with affected CLECs to come to an agreement on an appropriate amendment to their interconnection agreements pursuant to the process described in this order.

THEREFORE, IT IS ORDERED that:

A. Within 30 days of the date of this order, SBC Michigan shall submit to the Commission fully executed copies of the amendment that complies with the findings and conclusions of this order. The parties shall agree to and follow an orderly transition process, as provided in this order.

B. Within 60 days of the date of this order, Verizon North Inc. and Contel of the South, Inc., d/b/a Verizon North Systems and TC3 Telecom, Inc., TelNet Worldwide, Inc., XO Communications Services, Inc., and any other competitive local exchange carrier that has an interconnection agreement with Verizon shall file a fully executed copy of an amendment for approval in the appropriate dockets or follow the alternative process outlined in this order.

The Commission reserves jurisdiction and may issue further orders as necessary.

Any party desiring to appeal this order must do so in the appropriate court within 30 days after issuance and notice of this order, pursuant to MCL 462.26

Mary Jo Kunkle, Its Executive Secretary

OPPOSITION
BRIEF

M4 ② ②

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Nos. 10-313 & 10-329

IN THE

Supreme Court of the United States

TALK AMERICA INC.
AND
ORJIAKOR N. ISIOGU, MONICA MARTINEZ, AND
GREG R. WHITE, COMMISSIONERS OF THE
MICHIGAN PUBLIC SERVICE COMMISSION,
Petitioners,
v.

MICHIGAN BELL TELEPHONE COMPANY
D/B/A AT&T MICHIGAN, ET AL.,
Respondents.

**On Petitions for a Writ of Certiorari
to the United States Court of Appeals
for the Sixth Circuit**

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November 1, 2010

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QUESTION PRESENTED

Whether 47 U.S.C. § 251(c)(2) — which requires an incumbent local exchange carrier to provide interconnection "*for* the facilities and equipment *of* any [competing] carrier" at a point "*within* the [incumbent] carrier's network" (emphases added) — requires the incumbent to provide to a competing carrier, at extremely low regulated rates, all of the facilities and equipment that the competing carrier uses to span the distance (which may be miles) between its own network and the incumbent's network.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of this Court, respondent Michigan Bell Telephone Company d/b/a AT&T Michigan states the following:

Michigan Bell Telephone Company d/b/a AT&T Michigan is a wholly owned subsidiary of AT&T Teleholdings, Inc., which in turn is a wholly owned subsidiary of AT&T Inc., a publicly owned corporation. AT&T Inc. has no parent company, and no publicly owned company owns 10% or more of its stock.

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Although the court below reached the correct decision, AT&T Michigan agrees with petitioners that review by this Court is warranted. The courts of appeals are intractably divided on a question involving one of the central provisions of the Telecommunications Act of 1996 ("1996 Act"), as to which the Federal Communications Commission ("FCC" or "Commission") has long recognized that there is a need for national uniformity. The Court should grant the petitions to resolve this division of authority and should affirm the Sixth Circuit's decision.[1]

STATEMENT

1. In the 1996 Act, Congress "fundamentally restructure[d] local telephone markets" and "subject[ed]" incumbent local exchange carriers ("incumbent LECs" or "ILECs"), like AT&T Michigan, "to a host of duties intended to facilitate market entry" by new providers of local telephone service. *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 371 (1999). "Foremost among these duties is the [incumbent] LEC's obligation . . . to share its network with competitors" by providing competing LECs ("CLECs") with leased access to "elements of the incumbent's network 'on an unbundled basis.'" *Id.* (quoting 47 U.S.C. § 251(c)(3)).

In its initial order implementing the 1996 Act, the FCC interpreted § 251(c)(3) to require incumbent LECs to "provide interoffice transmission facilities on an unbundled basis," including such facilities "between . . . the wire centers of incumbent LECs and requesting carriers": that is, competing LECs.[2] The FCC also interpreted 47 U.S.C. § 252(d)(1), which sets the pricing standard for unbundled network elements, to require incumbent LECs to lease such elements to competitors using a methodology based on the "hypothetical" cost of a "most efficient element," "untethered to" either the incumbent LEC's "historical investment" or the cost of the "actual network element being provided." *Verizon Communications Inc. v. FCC*, 535 U.S. 467, 501 (2002). The FCC termed this pricing methodology "TELRIC" or "total element long-run incremental cost." *Id.* at 495-96.

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[1] With respect to No. 10-329, AT&T Michigan's acquiescence is limited to the first question presented, which also is the sole question presented in No. 10-313. The second question presented in No. 10-329 — whether the court below properly applied this Court's decision in *Auer v. Robbins*, 519 U.S. 452 (1997) — does not independently warrant review. *See infra* Part D.

As a result of these two decisions, a competing LEC could pay TELRIC rates to lease from an incumbent LEC an "entrance facility," which is the "cable or wire used to transport calls from a CLEC switch to an ILEC switch." Pet. App.[3] 3a.[4] Those TELRIC rates were "well below the costs the ILECs had actually historically incurred in constructing the elements." *United States Telecom Ass'n v. FCC*, 359 F.3d 554, 562 (D.C. Cir. 2004) ("*USTA II*"). In addition, the rates were well below the tariffed rates at which incumbent LECs had long sold, and still sell, entrance facilities to other carriers. *See Illinois Bell Tel. Co. v. Box*, 526 F.3d 1069, 1072 (7th Cir. 2008).

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[2] First Report and Order, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd 15499, ¶¶ 439-440 (1996) ("*Local Competition Order*"), *modified on recon.*, 11 FCC Rcd 13042 (1996), *vacated in part, Iowa Utils. Bd. v. FCC*, 120 F.3d 753 (8th Cir. 1997), *aff'd in part, rev'd in part sub nom. AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366 (1999); 47 C.F.R. § 51.319(d)(1) (1996). "Wire centers are where . . . switches are located." *MCI WorldCom Communications, Inc. v. BellSouth Telecomms., Inc.*, 446 F.3d 1164, 1166 (11th Cir. 2006); *accord* 47 C.F.R. § 51.5. Switches are the "equipment [that] direct[s] calls to their destinations." *Iowa Utils. Bd.*, 525 U.S. at 371.

[3] References to "Pet. App." are to the appendix to the petition for certiorari filed by Talk America in No. 10-313.

[4] Petitioner Talk America (at 6) reproduces a diagram from the Ninth Circuit's opinion in *Pacific Bell Telephone Co. v. California Public Utilities Commission*, 597 F.3d 958, 964 (9th Cir.

2. The FCC's rules implementing the unbundling requirement in § 251(c)(3) did not fare well in the courts. In 1999, this Court vacated the Commission's initial unbundling rules, finding, among other things, that the FCC had erroneously read the 1996 Act to require "blanket access to incumbents' networks." *Iowa Utils. Bd.*, 525 U.S. at 390. In 2002, the D.C. Circuit vacated the FCC's second set of unbundling rules, in which the FCC — still improperly operating on the "belief that . . . more unbundling is better," *United States Telecom Ass'n v. FCC*, 290 F.3d 415, 425 (D.C. Cir. 2002) ("*USTA I*") — had repromulgated virtually all of the unbundling rules this Court

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2010), that depicts an entrance facility not as a wire running between competing LEC and incumbent LEC switches, but instead as a discrete piece of the incumbent's network that is adjacent to the incumbent's switch. The Ninth Circuit created that diagram out of whole cloth and with no support in the record before it; in fact, both parties in that case (AT&T California and the California Public Utilities Commission) provided the Ninth Circuit with diagrams depicting an entrance facility as a wire spanning the distance between an AT&T California switch and a competing LEC's switch. *See* Brief of Appellant AT&T California at 4, *Pacific Bell*, *supra* (Nos. 08-15568 & 08-15716), 2008 WL 3312433; Brief of Appellees California Public Utilities Commission and Commissioners at 7, *Pacific Bell*, *supra* (Nos. 08-15568 & 08-15716), 2008 WL 4205276.

had vacated, including the rule requiring incumbents to unbundle entrance facilities.[5]

In 2003, the FCC issued its third unbundling order (known as the *Triennial Review Order*[6]), in which it revisited (among other things) its prior determinations that § 251(c)(3) requires an incumbent LEC to unbundle the entrance facilities that connect an incumbent LEC's switch to a competing LEC's switch. Characterizing its prior approach as "overly broad" and "misguided," the FCC now concluded that entrance facilities — that is, "transmission links that simply connect a competing carrier's network to the incumbent LEC's network" — "exist *outside* the incumbent LEC's local network" and, therefore, are excluded as a matter of definition from the category of network elements that could be subject to unbundling. *TRO* ¶¶ 365-366. The FCC explained further that excluding entrance facilities from incumbents' unbundling requirements is "consistent with the Act" because competing LECs "have control over where to locate their network facilities to minimize self-deployment costs" and should "incorporate those costs . . . into their network deployment strategies rather than . . . rely[ing] exclusively on the incumbent LEC's network." *Id.* ¶ 367.

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[5] *See* Third Report and Order and Fourth Further Notice of Proposed Rulemaking, *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, 15 FCC Rcd 3696, ¶¶ 347-348 (1999) ("*UNE Remand Order*"), *vacated and remanded*, *USTA I*, *supra*; 47 C.F.R. § 51.319(d) (1999).

[6] Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 18 FCC Rcd 16978 (2003) ("*Triennial Review Order*" or "*TRO*"), *vacated in part and remanded*, *USTA II*, *supra*.

The D.C. Circuit rejected the FCC's conclusion that entrance facilities fall outside the category of "network elements" that could be "subject to the statutory unbundling requirement[] of § 251(c)(3)." *USTA II*, 359 F.3d at 585. The court, however, did not question the FCC's policy analysis, noting that competing LECs themselves depicted "entrance facilities" "as completely stand-alone items linking a CLEC switch with an ILEC office" that "appear[] [to] *exist* exclusively for the convenience of the CLECs." *Id.* at 586. The D.C. Circuit therefore found it "anomalous that CLECs do not themselves provide" their own entrance facilities. *Id.*

In 2005, the FCC issued its fourth unbundling order (known as the *Triennial Review Remand Order*"[7]), which responded to the D.C. Circuit's decision in *USTA II*. Applying the statutory "impairment" standard used to determine which elements incumbent LECs must unbundle pursuant to § 251(c)(3), *see Iowa Utils. Bd.*, 525 U.S. at 388-90, the FCC concluded that competing LECs are *not* impaired without unbundled access to entrance facilities: "entrance facilities are less costly to build, are more widely available from alternative providers, and have greater revenue potential than dedicated transport between incumbent LEC" switches. *TRRO* ¶ 138.[8] Competing LECs can "choose to locate their switches" in order to "minimiz[e] the length and cost of entrance facilities" and to "increas[e] the possibility of finding an alternative wholesale suppl[ier]." *Id.* ¶ 138. The FCC therefore promulgated a rule stating that "incumbent LEC[s] [are] not obligated to provide . . . unbundled access" to entrance facilities. 47 C.F.R. § 51.319(e)(2)(i). Although various parties sought review of the FCC's 2005 order, none sought review of this rule.[9]

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[7] Order on Remand, *Unbundled Access to Network Elements; Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 20 FCC Rcd 2533 (2005) ("*Triennial Review Remand Order*" or "*TRRO*"), *petitions for review denied*, *Covad Communications Co. v. FCC*, 450 F.3d 528 (D.C. Cir. 2006).

[8] The FCC continued to require incumbent LECs to unbundle much of the dedicated transport that connects two incumbent LEC switches. *See TRRO* ¶¶ 125-135.

3. In the *Triennial Review Remand Order*, the FCC noted that many of its new unbundling rules would be implemented as incumbent and competing LECs made "changes to their interconnection agreements," *TRRO* ¶ 233, which are the contracts that are "Congress's chosen mechanism for increasing competition in the local telecommunications market." *Quick Communications, Inc. v. Michigan Bell Tel. Co.*, 515 F.3d 581, 585 (6th Cir. 2008); *see Pacific Bell v. Pac-West Telecomm, Inc.*, 325 F.3d 1114, 1127 (9th Cir. 2003). Under the 1996 Act, disputes about the terms that should be included in interconnection agreements are presented in the first instance to state commissions, which must apply the provisions of the Act and the FCC's implementing rules. *See* 47 U.S.C. § 252(a)-(e).

In those proceedings before state commissions, competing LECs began to assert that incumbents were still required to provide entrance facilities at TELRIC rates, notwithstanding the FCC's new rule expressly excluding entrance facilities from incumbents' unbundling obligations under § 251(c)(3). These carriers argued that incumbent LECs' separate "duty to provide, for the facilities and equipment of any requesting telecommunications carrier, interconnection with the [incumbent LEC's] network." 47 U.S.C. § 251(c)(2), includes the obligation to provide entrance facilities to a competing LEC that uses those facilities to interconnect the two LECs' networks. These carriers argued further that, because the FCC had applied its TELRIC pricing methodology to both § 251(c)(3) and § 251(c)(2), the same TELRIC rates that the competing LECs had been paying for unbundled entrance facilities should continue to apply. Finally, these carriers claimed to find support for their argument in the FCC's statement in paragraph 140 of the *Triennial Review Remand Order* that the agency's finding that § 251(c)(3) does not require incumbents to unbundle entrance facilities "does not alter the right of competitive LECs to obtain interconnection facilities pursuant to section 251(c)(2)."

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[9] The D.C. Circuit denied all of the petitions for review of the *Triennial Review Remand Order*. *See Covad Communications Co. v. FCC*, 450 F.3d 528 (D.C. Cir. 2006).

A number of state commissions rejected competitors' attempt to preserve TELRIC-priced access to a type of facility that the FCC found had "unique operational and economic characteristics" that rendered "self-deployment" and "wholesale provisioning" "viable alternatives" to obtaining entrance facilities from incumbent LECs at TELRIC rates. *TRRO* ¶ 141 & n.395. For example, the Ohio commission found that § 251(c)(2) requires an incumbent to "interconnect its network with . . . facilities and equipment" that are "provided by the CLEC, not leased from the ILEC," at TELRIC rates.[10] Similarly, the Texas commission found that, although competing LECs would continue to "obtain interconnection facilities pursuant to" § 251(c)(2), "entrance facilities are not subject to TELRIC rates," "whether [used] for interconnection or for unbundled access to network elements."[11]

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[10] Arbitration Award at 22-23, *Establishment of Terms and Conditions of an Interconnection Agreement Amendment Pursuant to the Federal Communications Commission's Triennial Review Order and its Order on Remand*, Case No. 05-887-TP-UNC, 2005 WL 3018712 (Ohio Pub. Utils. Comm'n

Other state commissions, including the Michigan and California commissions, accepted the competing LECs' contentions. Both of those commissions concluded that the FCC, in paragraph 140 of its *Triennial Review Remand Order*, made the "specific finding[]" that competing LECs "have a right to entrance facilities to the extent required for interconnection pursuant to Section 251(c)(2)." Pet. App. 185a.[12] AT&T Michigan and AT&T California each sought review of

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Nov. 9, 2005), *available at* http://dis.puc.state.oh.us/TiffToPDf/LZAH5X8NU6JSB7R+.pdf.

[11] Arbitration Award – Track I Issues at 16, *Arbitration of Non-Costing Issues for Successor Interconnection Agreements to the Texas 271 Agreement*, P.U.C. Docket No. 28821 (Tex. Pub. Util. Comm'n Feb. 23, 2005), *available at* http://interchange.puc.state.tx.us/WebApp/Interchange/Documents/28821_520_470294.PDF.

[12] *See* Order Granting Limited Rehearing of Decision (D.) 06-01-043 on the Issue Regarding Rules on Fiber-to-the-Home (FTTH), Fiber to the Curb (FTTC) and Hybrid Loop, Modifying the Decision and Denying Rehearing, as Modified, in All Respects at 9, *Application of Pacific Bell Telephone Company d/b/a SBC California for Generic Proceeding to Implement Changes in Federal Unbundling Rules Under Sections 251 and 252 of the Telecommunications Act of 1996*, Application 05-07-024, Decision 07-01-019 (Cal. Pub. Utils. Comm'n Jan. 11, 2007) (holding that ¶ 140 "clearly refuted" AT&T California's argument that § 251(c)(2) does not require an incumbent LEC to provide a competing LEC with entrance facilities), *available at* http://docs.cpuc.ca.gov/word_pdf/FINAL_DECISION/63687.pdf.

its respective commission's decision in federal district court.

4. The Michigan district court rejected the Michigan commission's conclusion, finding that it was "not reasonable" to interpret paragraph 140 of the *Triennial Review Remand Order* to require incumbent LECs to provide entrance facilities at TELRIC rates pursuant to § 251(c)(2). Pet. App. 158a. The court read the FCC's order to "convey[] [its] finding . . . that entrance facilities should be offered competitively," not at TELRIC rates. *Id.*

The Michigan commission and three competing LECs, including Talk America (petitioner in No. 10-313), appealed the district court's determination. The Sixth Circuit affirmed in a 2-1 decision.

The Sixth Circuit agreed with the district court that paragraph 140 of the *Triennial Review Remand Order* could not be read to impose on incumbent LECs the obligation to provide competing LECs with entrance facilities at TELRIC rates. Instead, the court found that the "most plausible" "plain reading" of paragraph 140 is that, "if [a competing LEC] build[s] [its] own entrance facility, the ILEC must still let [that carrier] hook it up to [the incumbent's] network (i.e., use its 'interconnection facility') at wholesale rates." *Id.* at 17a-18a. Therefore, the court below held that a competing LEC that "chooses to use [an] ILEC's entrance facility" — rather than "build its own entrance facility," "rent someone else's," or "connect directly" to the incumbent LEC, without using an entrance facility — "must pay the rates determined by the ILEC" in its tariff, not regulated TELRIC rates. *Id.* at 32a.

Thus, as the Sixth Circuit explained by way of an analogy to extension cords and electrical outlets, *see* *id.* at 18a-21a, there is a critical difference between entrance facilities and the "interconnection facilities" that incumbents provide to comply with § 251(c)(2). The former span the entire distance between a competing LEC's switch and an incumbent LEC's switch, which may "be very long," "even miles," if the competing LEC has elected to locate its switch far from the incumbent's. *Id.* at 3a. An interconnection facility, in contrast, is the equipment within the incumbent LEC's network to which the competing LEC's entrance facility connects; that equipment may be a port on a frame connected to the incumbent's switch or a cross connect cable attached to that frame (rough equivalents of the "wall outlet" and "surge protector" in the court's analogy). *Id.* at 19a-20a.

The Sixth Circuit rejected the Michigan commission's contrary reading of paragraph 140, holding that this interpretation "require[d] several assumptions, none of which is easily defended." *Id.* at 24a. In particular, the Michigan commission's interpretation presumed that the FCC had "used two separate terms" in paragraph 140 — "'entrance facility' and 'interconnection facility' — to describe the exact same wire, without any explanation why." *Id.*[13] Furthermore, that interpretation was based on an "unnatural reading" of the "phrase 'provide . . . interconnection *with* the [ILEC]'s network'" in § 251(c)(2) that had "no support in the statute." *Id.* at 28a (quoting 47 U.S.C. § 251(c)(2)) (omission and alteration in original). The better reading of that statutory phrase, the court found, was that "the ILEC is obligated" to "'make a plug-in available' *for* connection with the CLEC's facilities and equipment," not "to 'lease a physical facility (or wire)' *to* the CLEC." *Id.*

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[13] The Sixth Circuit also noted that the Michigan commission's position would require the court to adopt definitions of the terms "entrance facility" and "interconnection facility" that the FCC had never adopted and that, in the case of "interconnection facility," the FCC and courts had rejected. *See* Pet. App. 25a-28a.

The Sixth Circuit acknowledged that its holding conflicted with decisions of the Seventh and Eighth Circuits, which had held that, when the FCC referred in paragraph 140 of the *Triennial Review Remand Order* to the "right of competitive LECs to obtain *interconnection facilities* pursuant to section 251(c)(2)," the agency actually "said . . . that ILECs must allow use of *entrance facilities* for interconnection" at TELRIC rates. *Illinois Bell*, 526 F.3d at 1072 (emphases added); *see Southwestern Bell Tel., L.P. v. Missouri Pub. Serv. Comm'n*, 530 F.3d 676, 683-84 (8th Cir. 2008) (following *Illinois Bell*).[14] The court below did "not find th[o]se two cases persuasive," because those two courts' "'reasoning' is entirely circular" as each "assum[ed] the very question to be decided": namely, that "interconnection facilities" and "entrance facilities" are the same thing. Pet. App. 28a-31a.

The Sixth Circuit also refused to defer to the position of the FCC in an *amicus* brief, finding that the FCC's position "is so plainly erroneous" that it could "only conclude that the FCC has attempted to create a new *de facto* regulation under the guise of interpreting the regulation." *Id.* at 9a-10a n.6.[15] In that *amicus* brief, the FCC urged the Sixth Circuit to reverse the district court, asserting that the district court had improperly treated the "FCC's statement in paragraph 140" as "a mere 'explanatory comment' without legal force." *Id.* at 129a & n.32. But the FCC conceded in its brief that, while paragraph 140 stated that the FCC's decision not to require incumbents to unbundle entrance facilities "'does not alter the right of competitive LECs to obtain interconnection facilities pursuant to section 251(c)(2),'" *id.* at 125a (quoting *TRRO* ¶ 140), the FCC "did not specifically define what it meant by the term 'interconnection facilities,'" *id.* at 137a-138a. The FCC asserted only that the Michigan commission's "interpretation" of the term "interconnection facilities" "to include entrance facilities" was "fully consistent" with the agency's order. *Id.* at 138a.

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[14] This Court denied the Missouri Public Service Commission's petition for certiorari seeking review of a different decision that the Eighth Circuit reached in *Southwestern Bell*. *See Missouri Pub. Serv. Comm'n v. Southwestern Bell Tel., L.P.*, 129 S. Ct. 971 (2009).

5. Nine days after the court below ruled, the Ninth Circuit issued its decision in *Pacific Bell*. AT&T California had appealed a federal district court decision upholding the California commission's conclusion that, in paragraph 140, the FCC had "[c]learly . . . established" that incumbent LECs must lease entrance facilities to competing LECs at TELRIC rates. *Pacific Bell Tel. Co. v. California Pub. Utils. Comm'n*, No. C 07-1797 SI, 2008 WL 501390, at *7 (N.D. Cal. Feb. 21, 2008) (internal quotation marks omitted, alteration in original). The Ninth Circuit affirmed that decision, stating that it "agree[d] with our sister circuits" — that is, the Seventh and Eighth Circuits — "that FCC regulations authorize state public utilities commissions to order incumbent LECs to lease entrance facilities to competitive LECs at regulated rates for the purpose of interconnection." 597 F.3d at 965.

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[15] The panel requested the FCC's views following the December 10, 2008 oral argument. *See* Pet. App. 120a & n.1.

In reaching that decision, the Ninth Circuit did not address, or acknowledge the existence of, the Sixth Circuit's contrary decision, even though AT&T California brought that decision to the Ninth Circuit's attention on February 25, 2010 (one week before the Ninth Circuit issued its opinion). Nor did the Ninth Circuit mention — let alone defer to — the *amicus* brief that the FCC had filed with the Sixth Circuit, which the California commission had provided to the Ninth Circuit on May 18, 2009.

6. The Michigan commission and the competing LEC appellants sought rehearing of the Sixth Circuit's decision. The FCC took the unusual step of filing an *amicus* brief in support of those petitions for rehearing, in which it "inform[ed] the [Sixth Circuit] that the FCC continues to stand behind the interpretation and arguments set forth in its April 2009 *amicus* brief."[16] The Sixth Circuit sought a response to the petitions for rehearing but, on June 2, 2010, denied those petitions. *See* Pet. App. 90a-91a. The Michigan commission and Talk America filed petitions for a writ of certiorari on August 31, 2010.

The next day, the Ninth Circuit ruled on AT&T California's petition for rehearing of that court's decision in *Pacific Bell*. That court denied rehearing, but amended its opinion to state that the court

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[16] Brief for *Amicus Curiae* Federal Communications Commission in Support of Petitions for Rehearing and/or Rehearing *En Banc* at 3, *Michigan Bell Tel. Co. v. Covad Communications Co.*, Nos. 07-2469 & 07-2473 (6th Cir. filed Mar. 18, 2010), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-296968A1.pdf.

"agree[s] with the Seventh and Eighth Circuits and reject[s] the reasoning advanced by AT&T [California] and the Sixth Circuit in its recent 2-1 decision." *Pacific Bell Tel. Co. v. California Pub. Utils. Comm'n*, Nos. 08-15568 & 08-15716, 2010 WL 3421187, at *5 (9th Cir. Sept. 1, 2010) (to be reported at --- F.3d ---).

ARGUMENT

The court of appeals below correctly held that incumbent LECs have no obligation under § 251(c)(2) to provide TELRIC-priced entrance facilities to competing LECs and that a competing LEC purchasing an entrance facility from an incumbent — rather than "build[ing] its own entrance facility," "rent[ing] someone else's," or "connect[ing] directly" without using an entrance facility — instead must pay the incumbent LEC's tariffed rates. Pet. App. 32a.

AT&T Michigan agrees with petitioners, however, that review by this Court is warranted, because this case presents a recurring question of substantial importance on which there is a direct and acknowledged conflict among four courts of appeals. Although AT&T California intends to petition for certiorari from the Ninth Circuit's conflicting decision in *Pacific Bell*, this case presents an appropriate vehicle for resolution of this question.[17] Review by this Court to resolve this division of authority therefore would be appropriate.[18]

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[17] AT&T California's petition for certiorari is currently due on November 30, 2010. AT&T California anticipates asking this Court to hold its petition pending the outcome of these petitions, which raise the same issue in an identical procedural posture.

[18] AT&T Michigan's acquiescence is limited to the first question presented by the Michigan commission (petitioner in No. 10-329), which also is the sole question presented by Talk

A. Review Is Warranted To Resolve the Acknowledged and Mature Conflict Between the Sixth, Seventh, Eighth, and Ninth Circuits

Petitioners are correct that the courts of appeals disagree about whether the interconnection duty in § 251(c)(2) requires incumbent LECs to provide competing LECs with TELRIC-priced entrance facilities, which span the entire distance between a competing LEC's switch and an incumbent LEC's switch. *See* MPSC Pet. 14-16; Talk America Pet. 19-20.

The court below extensively reviewed — and expressly rejected as "not . . . persuasive" and "entirely circular" — the decisions of the Seventh and Eighth Circuits that had upheld state commission decisions requiring incumbent LECs to provide TELRIC-priced entrance facilities under § 251(c)(2). Pet. App. 28a-31a (discussing *Illinois Bell* and *Southwestern Bell*). The Sixth Circuit, moreover, reached precisely the opposite conclusion from the Seventh and Eighth Circuits on the question of incumbent LEC's obligations under § 251(c)(2) in the context of entrance facilities.

The Ninth Circuit then deepened the circuit conflict when it "agree[d] with" the Seventh and Eighth Circuits "that FCC regulations authorize state public utilities commissions to order incumbent LECs to lease entrance facilities to competitive LECs at regulated rates for the purpose of interconnection." *Pacif-*

America (petitioner in No. 10-313). The second question the Michigan commission presents — whether the court below properly applied this Court's decision in *Auer* — does not independently warrant review, as the court below properly stated the rule in *Auer* and its decision does not conflict with the decision of any other court. *See infra* Part D.

ic Bell, 597 F.3d at 965. Although the Ninth Circuit's opinion did not acknowledge the existence of the Sixth Circuit's contrary decision, the Ninth Circuit's decision on rehearing (issued the day after these petitions were filed) leaves no doubt of its view that the Sixth Circuit erred and that the Seventh and Eighth Circuits reached the correct decision. As explained above, that court amended its initial decision to state expressly that it "agree[s] with the Seventh and Eighth Circuits and reject[s] the reasoning advanced by . . . the Sixth Circuit in its recent 2-1 decision." *Pacific Bell*, 2010 WL 3421187, at *5.

Over the course of two years, four courts of appeals have addressed the issue, and the result is a square and acknowledged conflict among them. The conflict thus is fully developed without any realistic prospect of it being resolved by further litigation in the lower courts or by pending FCC action. Indeed, the Sixth Circuit and the Ninth Circuit each denied rehearing in its respective case, making it exceedingly unlikely that the circuit conflict will be resolved without this Court's intervention. The timing of the decision below and the directly conflicting decision from the Ninth Circuit nine days later underscores that the time is ripe for this Court to resolve the conflict and to bring much needed clarity to this significant issue of telecommunications law.

In addition, this case is an appropriate vehicle for resolving the question presented. The issue is squarely presented. There are no preliminary or threshold issues, and the essential facts are undisputed. Nor is there any alternative ground on which to affirm the decision below.

B. The Circuit Conflict Involves a Recurring Issue of Great Practical Importance

Petitioners also are correct that the issue raised by this case is of broad national importance, because it involves a key provision of the 1996 Act and affects the terms on which AT&T Michigan and other incumbent LECs must interconnect with numerous other carriers.

1. The FCC has long recognized the need for national, uniform rules regarding the obligations that § 251(c) imposes on incumbent LECs. *See Local Competition Order* ¶¶ 54, 56, 60. When it first promulgated rules to implement the 1996 Act, the FCC specifically "conclude[d] that national rules regarding interconnection pursuant to section 251(c)(2) are necessary to further Congress's goal of creating conditions that will facilitate the development of competition in the telephone exchange market." *Id.* ¶ 179. In defending its authority to promulgate national rules before this Court, the government likewise stressed the need for "nationally consistent interpretations of the Act's key provisions," explaining that "Congress did not leave room for each of 50 state commissions to disagree about the basic federal issues that arise under the 1996 Act." Opening Brief for the Federal Petitioners at 16, *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366 (1999) (No. 97-831), *available at* http://www.justice.gov/osg/briefs/1997/3mer/2mer/97-0831.mer.pdf; *see id.* at 17 (urging deference to its "expert determination that the absence of a national framework would impair effective implementation of the 1996 Act").

The FCC also recognized the importance of the specific issue presented here, when it filed an uninvited *amicus* brief in support of the petitions for rehearing of the Sixth Circuit's decision. *See supra* p. 1. This action not only appears to be unprecedented,[19] but also stands in stark contrast to the FCC's inaction in another recent case. In *Vonage Holdings Corp. v. Nebraska Public Service Commission*, 564 F.3d 900 (8th Cir. 2009), the Eighth Circuit held that the Nebraska commission was preempted from requiring VoIP providers (such as Vonage) to contribute to the state's Universal Service Fund, despite the FCC's contention in its *amicus* brief (filed without a request from the court) that the Eighth Circuit should reject Vonage's preemption claim.[20] Although the Nebraska commission sought rehearing, the FCC did not file an *amicus* brief in support of that petition.

2. The question presented is frequently litigated and warrants this Court's immediate resolution.

Entrance facilities are a common means of achieving interconnection with an incumbent LEC: AT&T Michigan and its incumbent LEC affiliates provide more than 15,000 entrance facility interconnection arrangements nationwide to competing LECs and wireless carriers today.[21] Unsurprisingly, disputes about the price that incumbent LECs may charge for entrance facilities — whether they may charge tariffed rates set under the traditional just-and-reasonable standard or must charge far lower rates set under the FCC's TELRIC methodology — remain the subject of active litigation between incumbent LECs and both competing LECs and wireless carriers. For example, the Colorado and Oregon commissions weighed in for the first time on this issue in 2008, reaching opposite results.[22] And affiliates of AT&T Michigan have pending litigation raising this question before state commissions in a number of circuits, including the Fourth, Fifth, and Eleventh Circuits. Unless this Court resolves the question, the state commissions will be forced to navigate the division of authority in the courts of appeals as they attempt to fulfill their obligation to rule in accordance with "the requirements of section 251." 47 U.S.C. § 252(c)(1).

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[19] A review of the FCC's online archive of court filings, *see* http://www.fcc.gov/ogc/archivedfilings.html, as well as of publicly available online databases, reveals no other uninvited *amicus* filings by the FCC in support of a petition for rehearing.

[20] *See* Brief for Amici Curiae United States and Federal Communications Commission Supporting Appellants' Request for Reversal at 14, *Vonage Holdings Corp. v. Nebraska Pub. Serv. Comm'n*, 564 F.3d 900 (8th Cir. 2009) (No. 08-1764), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-284738A1.pdf.

[21] Although wireless carriers are not entitled to lease TELRIC-priced unbundled network elements under § 251(c)(3), *see TRRO* ¶ 34, the FCC has long permitted wireless carriers to

In addition, the issue is important and urgent. In upholding the FCC's TELRIC-pricing methodology, this Court recognized that TELRIC rates were

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benefit from incumbent LEC's interconnection obligations under § 251(c)(2), *see Local Competition Order* ¶ 1015.

[22] *See* Order Addressing Applications for Rehearing, Reargument, or Reconsideration at 5-8, *Sprint Communications Company L.P.'s Petition for Arbitration with CenturyTel of Eagle, Inc. Pursuant to § 252(b) of the Communications Act of 1934, as Amended by the Telecommunications Act of 1996*, Docket No. 08B-121T, Decision No. C08-1218, 2008 WL 5158834 (Colo. Pub. Utils. Comm'n Nov. 20, 2008) (Issue 5); Order at 5-7, *Sprint Communications Company L.P. Petition for Arbitration of an Interconnection Agreement with CenturyTel of Oregon, Inc.*, ARB 830, Order No. 08-486, 2008 WL 4493108 (Or. Pub. Util. Comm'n Sept. 30, 2008) (Issue 6), *vacated in part on other grounds on recon.*, ARB 830, Order No. 09-109, 2009 WL 904645 (Or. Pub. Utils. Comm'n Mar. 31, 2009).

limited to "bottleneck elements." *See, e.g., Verizon*, 535 U.S. at 510 & n.27, 515-17; *see also Illinois Bell Tel. Co. v. Box*, 548 F.3d 607, 609-10 (7th Cir. 2008) (Posner, J.) (explaining that unbundling is intended only for "bottleneck facilities"). There are well-recognized competitive harms that flow from mandating TELRIC pricing of non-bottleneck facilities. Requiring incumbent LECs to sell such facilities at below-market TELRIC rates "reduce[s] or eliminate[s] the incentive . . . for a CLEC" to self-deploy entrance facilities, "because it can get the element cheaper" from the incumbent. *USTA I*, 290 F.3d at 424. The FCC likewise has recognized that TELRIC pricing "create[s] disincentives for . . . competitive LECs to deploy . . . facilities." *TRRO* ¶ 36.[23]

Here, there can be no serious claim that entrance facilities are bottleneck elements: the FCC found in 2005 not only that entrance facilities have "unique operational and economic characteristics" that render "self-deployment" and "alternative wholesale supply" possible, but also that it was undisputed that competing LECs were in fact "increasingly relying on competitively provided entrance facilities," which "are widely available." *Id.* ¶¶ 138-139, 141. Requiring incumbents to provide entrance facilities at TELRIC rates thus contradicts the purpose of the 1996 Act, which was not "to guarantee competitors access to ILEC network elements at the lowest price that government may lawfully mandate," but instead "to stimulate competition — preferably genuine, facilities-based competition." *USTA II*, 359 F.3d at 576; *see Iowa Utils. Bd.*, 525 U.S. at 429 (Breyer, J., concurring in relevant part) ("It is in the *un* shared, not in the shared, portions of the enterprise that meaningful competition would likely emerge.").

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[23] *See TRRO* ¶ 218 (TELRIC pricing for non-bottleneck elements can "seriously undermine infrastructure investment and hinder the development of genuine, facilities-based competition"); *see also TRO* ¶ 656 (TELRIC pricing for non-bottleneck elements is "no[t] necessary to protect the public interest").

C. The Decision Below Is Correct and Should Be Affirmed

The Sixth Circuit correctly held that § 251(c)(2) does not require incumbent LECs to provide TELRIC-priced entrance facilities to competing LECs.

1. Section 251(c)(2) requires an incumbent LEC, such as AT&T Michigan, "to provide, *for* the facilities and equipment *of* any requesting telecommunications carrier, interconnection with the local exchange carrier's network" at a "point *within* the [incumbent LEC's] network." 47 U.S.C. § 251(c)(2)(B) (emphases added). It is plain that the only "facilities and equipment" to which § 251(c)(2) refers belong to the requesting carrier,[24] not to the incumbent LEC, and the incumbent's duty is to "provide . . . interconnection" "for" the other carrier's facilities and equipment. Moreover, that interconnection is to occur at a point "within" the incumbent LEC's network, not by the incumbent LEC providing facilities that reach all the way to the competing LEC's switch, which is a point on the competing LEC's network.

The "[]natural reading" of the statute, as the Sixth Circuit found, is that an incumbent LEC must provide a place within its network for a competing LEC to "plug-in" its own facilities and equipment, and that the incumbent need not "'lease a physical facility (or wire)' *to* the CLEC" — that is, an entrance facility — to span the distance between the two carriers' networks. Pet. App. 28a.

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[24] The "requesting telecommunications carrier" is a competing LEC or other carrier (including wireless carriers) seeking to provide local telephone service in competition with the incumbent LEC. *See Local Competition Order* ¶¶ 190-191, 1015.

That reading is supported by § 252(d)(1), which is the pricing provision that applies to both the interconnection duty in § 251(c)(2) and the unbundling duty in § 251(c)(3). With respect to the unbundling duty, § 252(d)(1) applies to the "rate for [the] network elements" that incumbent LECs must lease to competitors. 47 U.S.C. § 252(d)(1). In contrast, with respect to the interconnection duty, § 252(d)(1) applies to the "rate for the interconnection *of* facilities and equipment." *Id.* (emphasis added). If Congress had meant for § 251(c)(2) to require incumbent LECs to lease facilities and equipment to other carriers, as § 251(c)(3) requires, it would instead have established a pricing standard "for the facilities and equipment used for interconnection," just as it established one "for the network elements" that must be unbundled. But that is not what Congress did.

2. The FCC's orders and regulations interpreting and implementing the 1996 Act further support this reading of § 251(c)(2). In its first order implementing the Act, the FCC distinguished the interconnection duty in § 251(c)(2) from the unbundling duty in § 251(c)(3). The former duty allows competing LECs "to choose the most efficient points at which to exchange traffic with incumbent LECs," while it is the latter that "permits new entrants . . . to substitute incumbent LEC facilities for some or all of the facilities the new entrant would have had to obtain in order to compete." *Local Competition Order* ¶ 172.

Although the FCC has interpreted § 251(c)(2) to require incumbents, "at least to some extent, to adapt their facilities to interconnection . . . by other carriers" — as incumbent's networks "were not designed to accommodate third party interconnection," *id.* ¶ 202 — the FCC has never found those required accommodations to include leasing to a competing LEC the entire facility spanning the distance between the two networks.[25] Instead, the only FCC regulations that ever required incumbents to provide entrance facilities to competitors were promulgated to implement the separate unbundling duty in § 251(c)(3).[26] The FCC's long-standing interconnection regulations, in contrast, simply identify the various "point[s] within the incumbent LEC's network" where interconnection may occur. 47 C.F.R. § 51.305(a)(2)(i)-(vi); *see also id.* § 51.321(b)(1).[27]

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[25] The furthest the FCC ever stretched the obligation to accommodate interconnection was to require incumbent LECs to enter into "meet point arrangements," where both the incumbent and the competing LEC each "pays its portion of the costs to build out the facilities to the meet point." *Local Competition Order* ¶ 553; *see* 47 C.F.R. § 51.321(b)(2) (codifying the meet-point obligation). The FCC stressed that meet-point arrangements would require incumbent LECs to engage in only "some," "limited build-out of facilities" as an "accommodation of interconnection," while requiring "each party to bear a reasonable portion of the economic costs of the arrangement." *Local Competition Order* ¶ 553.

[26] *See Local Competition Order* ¶¶ 439-440; 47 C.F.R. § 51.319(d)(1) (1996); *UNE Remand Order* ¶¶ 347-348; 47 C.F.R. § 51.319(d) (1999).

[27] The term "interconnection facility" appears only once in the FCC's regulations implementing § 251(c)(2). *See* 47 C.F.R. § 51.305(a)(3) ("requir[ing] an incumbent LEC to design interconnection facilities to meet the same technical criteria and service standards that are used within the incumbent LEC's network").

3. None of the three circuits to reach the opposite result sought to square their ruling with the text of § 251(c)(2). Nor do petitioners here do so. Instead, they rely on paragraph 140 of the *Triennial Review Remand Order*, claiming that the FCC there "explicitly recognized" that incumbents must provide competing LECs with TELRIC-priced entrance facilities. MPSC Pet. 9-10; *accord* Talk America Pet. 25. In fact, as the Sixth Circuit held, paragraph 140 "actually says no such thing." Pet. App. 30a. Instead, the FCC there stated only that § 251(c)(2) requires incumbent LECs to provide "interconnection facilities," which is a term that the FCC conceded in its *amicus* brief that it "did not specifically define." *Id.* at 138a. Petitioners thus err in claiming that the FCC has defined "interconnection facility" so broadly that it encompasses any (and every) incumbent-LEC-owned facility that a competing LEC could use in order to interconnect its network to the incumbent's. *See* Talk America Pet. 25; MPSC Pet. 13. Instead, as discussed above, an interconnection facility is the equipment within the incumbent LEC's network to which a competing LEC attaches its own facilities and equipment.

Moreover, in paragraph 140, the FCC stated only that its decision not to require incumbent LECs to provide entrance facilities as unbundled network elements under § 251(c)(3) "does not alter" competing LECs' "right[s]" under § 251(c)(2). *TRRO* ¶ 140. Therefore, paragraph 140 cannot be read to create a new right, but simply refers back to any pre-existing rights under § 251(c)(2). Yet no prior FCC order or regulation, or other source of legal authority, had found in § 251(c)(2) a right for competing LECs to demand TELRIC-priced entrance facilities from incumbent LECs.[28]

Finally, as the court below concluded, the claim that paragraph 140 established a new obligation on incumbent LECs cannot be squared with the surrounding paragraphs of the FCC's order. *See* Pet. App. 17a-18a. The FCC noted in paragraph 140 that § 251(c)(2) means that competing LECs "will have access to these [interconnection] facilities at

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[28] Petitioners rely on the FCC's discussion in the *Triennial Review Order* regarding competing LECs' prior use of entrance facilities obtained as unbundled network elements under § 251(c)(3) for so-called "backhauling." *See* MPSC Pet. 8, 11; Talk America Pet. 5-9. However, that discussion was not repeated in the *Triennial Review Remand Order* and has no relevance here, as the Sixth Circuit found. *See* Pet. App. 25a n.13. Nonetheless, AT&T Michigan notes that the Seventh, Eighth, and Ninth Circuits all operated under a misunderstanding of "backhauling." "Backhauling" describes a competing LEC's use of an entrance facility to connect its own switch to a loop (the wire connecting a customer premises to a switch) that the competing LEC obtained from an incumbent LEC as an unbundled element under § 251(c)(3); the competing LEC then uses its switch to provide telephone service to the customer connected to the unbundled loop. *See, e.g., TRO* ¶ 480 ("[t]he need to backhaul the circuit [*i.e.*, the loop] derives from the [competing LEC's] use of a switch located in a location relatively far from the end user's premises"). Traffic "backhauled" to the competing LEC switch over that unbundled entrance facility might then be routed from the switch to other customers of the competing LEC, but it also might be routed to customers of an incumbent LEC or a third-party carrier. The Seventh, Eighth, and Ninth Circuits thus were wrong to define "backhauling" as limited to "mov[ing] traffic among CLEC customers." *Illinois Bell*, 526 F.3d at 1071; *see Southwestern Bell*, 530 F.3d at 681 (describing backhauling as "CLEC to CLEC traffic"); Pet. App. 53a (describing backhauling as a competing LEC "us[ing] the entrance facility to permit its *own* customers to reach *one another* over the incumbent LEC[']s network").

[TELRIC] rates *to the extent that they require them* to interconnect with the incumbent LEC's network." *TRRO* ¶ 140 (emphasis added). In the surrounding paragraphs, however, the FCC established that competing LECs do *not* require TELRIC-priced entrance facilities, which have "unique operational and economic characteristics" that both "justify self-deployment" and explain the widespread availability of "competitively provided entrance facilities." *Id.* ¶¶ 138-139, 141. This is yet another reason why the Sixth Circuit correctly rejected petitioners' attempt to equate "interconnection facilities" with "entrance facilities."[29]

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[29] Talk America takes issue (at 22, 26, 29) with various statements in footnotes in the decision below, rather than grappling with the centerpiece of the Sixth Circuit's reasoning — namely, its rejection of Talk America's "unnatural reading" of § 251(c)(2) and paragraph 140 of the *Triennial Review Remand Order*. Pet. App. 24a-28a. Talk America's challenges to the periphery of the Sixth Circuit's opinion lack merit and, in all events, provide no basis for rejecting the Sixth Circuit's core conclusions. In particular, Talk America is wrong to rely (at 23) on a paragraph of an FCC Staff order stating, in passing, that certain "'entrance facilities' are interconnection facilities." Memorandum Opinion and Order, *Petition of WorldCom, Inc. Pursuant to Section 252(e)(5) of the Communications Act of 1934 for Preemption of the Jurisdiction of the Virginia State Corporation Commission Regarding Interconnection Disputes with Verizon Virginia Inc., and for Expedited Arbitration*, 17 FCC Rcd 27039, ¶ 58 (Chief, Wireline Comp. Bur. 2002). The facilities at issue there were ones the competitive LEC proposed to sell to the incumbent LEC. *See id.* As the FCC Staff recognized, § 251(c)(2) does not govern those facilities. *See id.* ¶ 71 n.200. Moreover, when the FCC Staff addressed the entrance facilities that the incumbent LEC would sell to the competing LEC — that is, the very same facilities at issue here — it grounded its analysis entirely in § 251(c)(3) and the FCC's then-effective unbundling regulations, without describing the entrance facilities as "interconnection facilities" or suggesting

D. Whether the Court Below Properly Applied *Auer* Does Not Independently Warrant Review

The Michigan commission — but not Talk America — presents as an independent question for review whether the court below erred in refusing to defer to the FCC's position in its *amicus* brief, which the Michigan commission claims conflicts with the Ninth Circuit's decision in *Pacific Bell*. Unlike the question of the proper construction of incumbent LEC's obligations under § 251(c)(2), on which there is a clear and acknowledged conflict among the circuits, the Sixth Circuit's application of this Court's decision in *Auer* does not conflict with any other circuit's decision. Instead, the Michigan commission's second question simply raises a claim for error correction, which does not independently warrant review. *See, e.g.*, *Ross v. Moffitt*, 417 U.S. 600, 616-17 (1974) ("This Court's review . . . is discretionary and depends on numerous factors other than the perceived correctness of the judgment we are asked to review.").[30]

The court below correctly stated the rule applied in *Auer*: that "a federal agency's interpretation of its own ambiguous regulation — even an interpretation presented in an amicus brief — is 'controlling unless plainly erroneous or inconsistent with the regulation.'" Pet. App. 8a n.6 (quoting *Auer*, 519 U.S. at 461). The court found the FCC's position in its

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that § 251(c)(2) independently required the same result. *See id.* ¶¶ 210-217.

[30] Limiting the grant of the Michigan commission's petition to the first question will not affect the Court's ability to consider what deference, if any, to give to the position set out in the *amicus* brief on the merits that the FCC likely will file with this Court.

amicus brief here to be "so plainly erroneous or inconsistent with the regulation" that it "decline[d] . . . to apply *Auer* deference" to that position. *Id.* at 10a n.6. The lower court's ruling is correct and is consistent with this Court's own refusal to defer to an agency's unreasonable interpretation of a regulation. *See Christensen v. Harris County*, 529 U.S. 576, 588 (2000) (finding that "*Auer* deference is unwarranted" where the agency's interpretation conflicted with "the regulation's obvious meaning"). Courts of appeals routinely refuse to defer to agency interpretations under *Auer* (or, more generally, under the *Seminole Rock* line of authority) where the agency's interpretation is "plainly erroneous or inconsistent with the regulation."[31]

The Michigan commission, however, claims (at 4) that the decision below conflicts with the Ninth Circuit's decision in *Pacific Bell*, in which that court purportedly "afforded [*Auer*] deference to the FCC's interpretation when examining the identical issue."[32] In fact, the Ninth Circuit did not address the question whether the FCC's *amicus* brief warranted *Auer* deference. The Ninth Circuit did not discuss that *amicus* brief at all, even though the California commission had relied on the FCC's brief in defending its decision on appeal. As a result, the Ninth Circuit's decision cannot conflict with the Sixth Circuit's refusal to defer under *Auer* to the FCC's position in its *amicus* brief.

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[31] *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 413-14 (1945); *see, e.g.*, *City of Cleveland v. Ohio*, 508 F.3d 827, 847 (6th Cir. 2007); *Duchek v. NTSB*, 364 F.3d 311, 314 (D.C. Cir. 2004) (Roberts, J.); *Public Citizen Inc. v. Mineta*, 343 F.3d 1159, 1166-67 (9th Cir. 2003); *Moore v. Hannon Food Serv., Inc.*, 317 F.3d 489, 497 (5th Cir. 2003).

[32] Although Talk America (at 30-31) criticizes the Sixth Circuit's treatment of the FCC's *amicus* brief, it makes no claim of a circuit conflict.

Furthermore, to the extent the Ninth Circuit discussed *Auer*, it did so only with respect to the FCC's 2003 *Triennial Review Order*, which the Ninth Circuit believed contained a "reasonable" interpretation of the FCC's 1996 *Local Competition Order* that supported the court's ruling. *Pacific Bell*, 597 F.3d at 968. However, no party before the Sixth Circuit — including the FCC as *amicus curiae* — advanced this claim about the *Triennial Review Order*, much less urged that court to defer to the FCC's supposed interpretation of its 1996 order. The FCC itself discussed its *Triennial Review Order* in only two short passages of its *amicus* brief, in which it described that order as preserving a pre-existing obligation to make "interconnection facilities" or "facilities" — not "entrance facilities" — available at TELRIC rates. *See* Pet. App. 137a, 138a.[33] The FCC's *amicus* brief thus confirms that it is the Ninth Circuit that erred in its application of *Auer*, by deferring to a reading of the *Triennial Review Order* different from the agency's own.

CONCLUSION

The petitions for a writ of certiorari in No. 10-313 and No. 10-329 (limited to Question 1) should be granted.

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[33] Consistent with this aspect of the FCC's position in its *amicus* brief, the court below read the *Triennial Review Order* as treating "interconnection facilities and entrance facilities [as] different things," with only interconnection facilities required to be provided at TELRIC rates. Pet. App. 27a n.13. The Seventh and Eighth Circuits, in reaching the same result as the Ninth Circuit, did not cite the *Triennial Review Order*.

Respectfully submitted.

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PETITIONER'S BRIEF

No. 10-313

IN THE

Supreme Court of the United States

TALK AMERICA INC.,
Petitioner,
v.
MICHIGAN BELL TELEPHONE COMPANY,
D/B/A AT&T MICHIGAN,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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QUESTION PRESENTED

Was the Michigan Public Service Commission barred from requiring incumbent local exchange carriers ("ILECs") to offer their competitors telecommunications facilities known as "entrance facilities" at cost-based rates under § 251(c)(2) of the Telecommunications Act of 1996 as a result of a Federal Communications Commission rule eliminating ILECs' obligation to provide similar facilities under § 251(c)(3) when they are used by competitors for a different statutory purpose?

PARTIES TO THE PROCEEDING

In addition to Talk America Inc., Covad Communications Company and XO Communications were Intervenors-Defendants-Appellants in the court of appeals. Michigan Bell Telephone Company d/b/a AT&T Michigan was Plaintiff-Appellee in the court of appeals. The following parties, or their predecessors in office, were Defendants-Appellants in the court of appeals: Michigan Public Service Commission, J. Peter Lark, Laura Chappelle, and Monica Martinez, in their official capacities as Commissioners of the Michigan Public Service Commission. Commissioners currently appointed to the Michigan Public Service Commission are Orjiakor N. Isiogu, Monica Martinez, and Greg R. White. In addition, McLeodUSA Telecommunications Services, Inc. and TDS Metrocom, LLC were Intervenors in the court of appeals.

AMENDMENT TO RULE 29.6 CORPORATE DISCLOSURE STATEMENT

As of December 6, 2010, through intermediate wholly-owned subsidiaries, Petitioner Talk America Inc. is a wholly-owned indirect subsidiary of PAETEC Holding Corp., a publicly held company (NASDAQ: PAET). No publicly-held company owns 10% or more of the stock of PAETEC Holding Corp.

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IN THE

Supreme Court of the United States

No. 10-313

TALK AMERICA INC.,
Petitioner,
v.
MICHIGAN BELL TELEPHONE COMPANY,
D/B/A AT&T MICHIGAN,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF FOR PETITIONER

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-45a) is reported at 597 F.3d 370. The court's order denying rehearing and rehearing en banc (Pet. App. 90a-91a) is unreported. The district court's opinion (Pet. App. 143a-169a) is not reported in the *Federal Supplement* but is available at 2007 WL 2868633.

JURISDICTION

The judgment of the court of appeals was entered on February 23, 2010 (Pet. App. 1a), and it denied petitioner's timely filed petition for rehearing en banc on June 2, 2010 (Pet. App. 90a). The petition for a writ of certiorari was filed on August 31, 2010, and granted on December 10, 2010. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The full text of the most pertinent provisions of the Telecommunications Act of 1996, 47 U.S.C. §§ 251-252, are reproduced at Pet. App. 92a-111a. In addition, 47 U.S.C. § 201 is reproduced below.

> § 201. Service and charges
>
> (a) It shall be the duty of every common carrier engaged in interstate or foreign communication by wire or radio to furnish such communication service upon reasonable request therefor; and, in accordance with the orders of the Commission, in cases where the Commission, after opportunity for hearing, finds such action necessary or desirable in the public interest, to establish physical connections with other carriers, to establish through routes and charges applicable thereto and the divisions of such charges, and to establish and provide facilities and regulations for operating such through routes.
>
> (b) All charges, practices, classifications, and regulations for and in connection with such communication service, shall be just and reasonable, and any such charge, practice, classification, or regulation that is unjust or unreasonable is declared to be unlawful: *Provided*, That communications by wire or radio subject to this chapter may be classified into day, night, repeated, unrepeated, letter, commercial, press, Government, and such other classes as the Commission may decide to be just and reasonable, and different charges may be made for the

different classes of communications: *Provided further*, That nothing in this chapter or in any other provision of law shall be construed to prevent a common carrier subject to this chapter from entering into or operating under any contract with any common carrier not subject to this chapter, for the exchange of their services, if the Commission is of the opinion that such contract is not contrary to the public interest: *Provided further*, That nothing in this chapter or in any other provision of law shall prevent a common carrier subject to this chapter from furnishing reports of positions of ships at sea to newspapers of general circulation, either at a nominal charge or without charge, provided the name of such common carrier is displayed along with such ship position reports. The Commission may prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this chapter.

STATEMENT

Statutory and Regulatory Background

The Telecommunications Act of 1996 ("1996 Act" or "Act") was intended to eliminate the incumbent local telephone companies' monopolies and fundamentally restructure the telecommunications industry by imposing upon the incumbent local monopolists a host of duties whose purpose was to facilitate entry into the local market. As this Court stated: "[f]oremost among these duties is the [incumbent's] obligation under [251(c) of the Act] to share its network with competitors." *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 371 (1999).[1]

That obligation to share is set out in § 251 of the Act, which imposes several different and independent duties. Two of those duties are at issue here. First, every incumbent local exchange carrier ("ILEC") has the "duty to provide, for the facilities and equipment of any requesting telecommunications carrier, interconnection with the local exchange carrier's network." 47 U.S.C. § 251(c)(2). Interconnection is to be provided "at any technically feasible point within the carrier's network" and must be provided on a non-discriminatory basis and at rates that are just and reasonable. *Id.* Second, every ILEC must provide requesting carriers access to network elements on an "unbundled basis," i.e., as unbundled network elements ("UNEs"), at any technically feasible point, on a nondiscriminatory basis and at rates that are just and reasonable. 47 U.S.C. § 251(c)(3).

Promptly after the Act became law, the Federal Communications Commission ("FCC") initiated a rulemaking proceeding to implement the Act, including the network sharing requirements of § 251,[2] and specifically §§ 251(c)(2) and 251(c)(3). With respect to the ILECs' interconnection obligation set forth in § 251(c)(2), the FCC sought comments on how interconnection and the concept of "technical feasibility" should be interpreted. In its resulting order, the FCC interpreted the term "interconnection" to mean "the physical linking of two networks for the mutual exchange of traffic." *In re Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, First Report and Order, 11 FCC Rcd 15499, 15590 ¶ 176 (1996) ("*Local Competition Order*"). Accordingly, the FCC's implementing regulations define "interconnection" as "the linking of two networks for the mutual exchange of traffic." 47 C.F.R. § 51.5. Furthermore, the FCC's regulations provide that ILECs must provide their competitors "any technically feasible method of obtaining interconnection." *Id.* § 51.321(a). The FCC's regulations require "an incumbent LEC to design interconnection facilities to meet the same technical criteria and service standards that are used within the incumbent LEC's network." 47 C.F.R. § 51.305(a)(3). The FCC's regulations also require that "[i]f technically feasible, an incumbent LEC shall provide two-way trunking upon request." *Id.* § 51.305(f). These rulings have remained unchanged.

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[1] In describing the monopolistic status of local telephone services that existed before the 1996 Act this Court said "AT & T and its satellites . . . [were] known as the 'Bell system,' which by the mid-20th century had come to possess overwhelming monopoly power in all telephone markets nationwide, supplying local-exchange and long-distance services as well as equipment." *Verizon Communications v. FCC*, 535 U.S. 467, 480 (2002), citing R. Vietor, CONTRIVED COMPETITION: REGULATION AND DEREGULATION IN AMERICA 171, 174-175 (1994).

[2] Section 251(c) also requires ILECs to make their retail services available at wholesale rates so that competing carriers can resell them (§ 251(c)(4)) and permit competitors to collocate

The FCC has not enjoyed such permanence with respect to its decisions implementing the ILECs' unbundling obligations under § 251(c)(3). The FCC's identification of network elements, its determination of which network elements must be made available

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at the ILECs' premises equipment used by competitors necessary for interconnection or for access to UNEs (§ 251(c)(6)).

as UNEs, and its decisions regarding the ILECs' role in combining UNEs for their competitors have all been challenged in the courts. Since the FCC's initial unbundling conclusions were set forth in the *Local Competition Order*, the FCC has repeatedly reexamined its unbundling rules in response to courts' rejection of some of those rules and in response to technological developments and expanding competition. The result has been that, in the decade between the date the Act became law and the FCC's last reexamination of the ILECs' unbundling obligations, the list of network elements that the ILECs must make available as UNEs has at times expanded and contracted.

The FCC's last, most recent, effort to address the network elements that must be provided as UNEs began with its Triennial Review Proceeding begun in December, 2001. Once again, the FCC looked at the elements that make up the ILECs' local networks: loops, central office and tandem switches, transport, packet switching, signaling networks, call-related databases and operational support system functions.[3]

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[3] This Court explained how certain elements of the local exchange related to each other and to the provision of local service in *Verizon*:

> The physical incarnation of such a market, a "local exchange," is a network connecting terminals like telephones, faxes, and modems to other terminals within a geographical area like a city. From terminal network interface devices, feeder wires, collectively called the "local loop," are run to local switches that aggregate traffic into common "trunks." The local loop was traditionally, and is still largely, made of copper wire, though fiber-optic cable is also used, albeit to a far lesser extent than in long-haul markets. Just as the loop runs from terminals to local switches, the trunks run from the local switches to centra-

Once again, the FCC applied the standard Congress established for UNEs under § 251(c)(3), namely that at a minimum it determine whether access to the network element is "necessary" and whether "the failure to provide access to such network elements would impair the ability of" the competing carrier to offer its services. 47 U.S.C. § 251(d)(2). This is the "necessary and impair" standard that delineates the limits of the ILECs' obligations to offer to competing carriers access to UNEs. *AT&T v. Iowa Utils. Bd.*, 525 U.S. at 391-392. The FCC issued its order in 2003. *In re Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Deployment of Wireline Services Offering Advanced Telecommunications Capability*, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, 18 FCC Rcd 16978 (2003), *corrected by Errata*, 18 FCC Rcd 19020 (2003) ("*Triennial Review Order*" or "*TRO*").

> lized, or tandem, switches, originally worked by hand but now by computer, which operate much like railway switches, directing traffic into other trunks. A signal is sent toward its destination terminal on these common ways so far as necessary, then routed back down another hierarchy of switches to the intended telephone or other equipment. A local exchange is thus a transportation network for communications signals, radiating like a root system from a "central office" (or several offices for larger areas) to individual telephones, faxes, and the like.

Verizon, 535 U.S. at 489-490 (footnotes omitted.) The elements of a local exchange market in their broadest sense are largely unchanged; the technology used in the industry has changed over time.

Among the network elements that the FCC determined need no longer be made available as a UNE under § 251(c)(3) was an element called an "entrance facility." The FCC analyzed entrance facilities as a form of dedicated transport, noting first, that its prior unbundling decision[4] had used a definition of dedicated transport that "applied to all technically feasible capacity levels between incumbent LEC wire centers, or between switches owned by incumbent LECs or requesting telecommunications carriers." *TRO*, 18 FCC Rcd at 17201, ¶ 362. It then noted that reviewing courts had criticized its broad unbundling determinations regarding dedicated transport, and in response to that criticism revised its definition so that dedicated transport would be limited to transmission facilities between an incumbent LEC's switches and wire centers, thus excluding entrance facilities from the definition. *Id.*, 18 FCC Rcd at 17202-203, ¶¶ 363-366.

The FCC analyzed the use to which competing carriers put these entrance facilities, noting that competitors use entrance facilities for two distinct purposes: (1) interconnection and (2) to carry their own traffic, for their end users, which the industry calls "backhaul." *Id.*, 18 FCC Rcd at 17203, ¶ 365. The FCC said that its conclusion that entrance facilities should not be provided as a UNE under § 251(c)(3) was "buttressed" by the economics of facilities used for "backhaul" between networks; competing carriers had access to alternative providers' facilities for the "backhaul" use and "some control" over the location of their own facilities. *Id.*, 18 FCC Rcd at 17204, ¶ 367.

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[4] *In re Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, Third Report and Order and Fourth Further Notice of Proposed Rulemaking, 15 FCC Rcd 3696 (1999), *corrected by Errata*, 16 FCC Rcd 1724 (1999).

Notably, the FCC wrapped up its discussion and its rulings with the following statement applicable to all competing carriers, including CMRS (cellular) providers:

> We find that no requesting carrier shall have access to unbundled inter-network transmission facilities under section 251(c)(3). Thus, assuming *arguendo*, that a CMRS carrier's base station is a type of requesting carrier switch, CMRS carriers are ineligible for dedicated transport from their base station to the incumbent LEC network. However, all telecommunications carriers, including CMRS carriers, will have the ability to access transport facilities *within* the incumbent LEC's network, pursuant to section 251(c)(3), and to interconnect for the transmission and routing of telephone exchange service and exchange access, *pursuant to section 251(c)(2)*.

Id., 18 FCC Rcd at 17206, ¶ 368 (second emphasis added) (footnotes omitted).

A number of ILECs, competitive local exchange carriers ("CLECs") and other parties challenged aspects of the *TRO*, on appeal, the D.C. Circuit affirmed some portions of the order and rejected others, remanding to the FCC those determinations the court rejected. The FCC's decision not to conduct an "impairment" test for entrance facilities, as required by § 251(c)(3) for all network elements, was one of the rejected FCC determinations. *United States Telecom Ass'n v. FCC*, 359 F.3d 554, 586 (D.C. Cir. 2004) ("*USTA II*"), *cert. denied sub nom.*, *Nat'l*

Ass'n of Regulatory Utility Comm'rs v. United States Telecom Ass'n, 543 U.S. 925 (2004).

On remand, the FCC conducted the required impairment test with respect to the unbundling of entrance facilities under § 251(c)(3), as required by *USTA II*, and ultimately restated its conclusion (which the D.C. Circuit had not overturned) that entrance facilities need not be unbundled pursuant to § 251(c)(3). *In re Unbundled Access to Network Elements, Review of Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Order on Remand, 20 FCC Rcd 2533, 2610 ¶ 137 (2005) ("*Triennial Review Remand Order*" or "*TRRO*"). It did not stop there, however. The FCC went on to state that:

> We note in addition that our finding of non-impairment with respect to entrance facilities does not alter the right of competitive LECs to obtain interconnection facilities pursuant to section 251(c)(2) for the transmission and routing of telephone exchange service and exchange access service. Thus, competitive LECs will have access to these facilities at cost-based rates to the extent that they require them to interconnect with the incumbent LEC's network.

Id., 20 FCC Rcd at 2611, ¶ 140 (footnotes omitted). The FCC recognized that the ILECs' obligations regarding interconnection under § 251(c)(2) are separate and distinct from their obligations regarding unbundling under § 251(c)(3) and stressed its understanding of this distinction by repeating the point it previously had made in the *TRO*.

While the unbundling debates were raging at the federal level, ILECs and CLECs were negotiating revisions to their interconnection agreements to implement the *TRO*, and then the *TRRO*.[7] In Michigan, this process was undertaken through negotiations facilitated by the Michigan Public Service Commission's (MPSC) staff and culminated in an arbitration conducted by the MPSC under § 252 of the Act. *In the Matter, on the Commission's Own Motion, To Commence A Collaborative Proceeding To Monitor and Facilitate Implementation of Accessible Letters Issued By SBC Michigan and Verizon*, Michigan Public Service Commission, Case No. U-14447. It is the validity of the MPSC's decision regarding the extent of the ILECs' obligations under the *TRRO* to provide entrance facilities that is the crux of the parties' dispute.

Specifically, the MPSC concluded in its Arbitration Order that the FCC's unbundling ruling in the *TRRO* eliminated the ILECs' duty to provide entrance facilities as a UNE under § 251(c)(3) of the 1996 Act, but left intact the ILECs' separate obligation to provide entrance facilities used for purposes of interconnection under § 251(c)(2). Pet. App. 185a.

Interconnection

The requirement that the ILECs interconnect their networks with other carriers' networks is critically important to opening the local telecommunications market to competition, but is not new. Soon after the invention of the telephone it became obvious that the competing telephone companies would have to interconnect their lines so that one company's customers could talk to another's and vice versa. That fundamental need has never changed. As one court recently observed, "[a] local telephone service is of little use if it cannot connect to other local telephone users." *Pacific Bell Tel. Co. v. California Pub. Utils. Comm'n*, 621 F.3d 836, 840 (9th Cir. 2010).

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[7] The D.C. Circuit rejected challenges to the FCC's rulings in the *TRRO* in *Covad Communications Co. v. FCC*, 450 F.3d 528 (D.C. Cir. 2006).

The FCC has interpreted the interconnection obligation established in § 251(c)(2) to be a requirement that the ILECs provide to their competitors a range of physical facilities that competitors can use to interconnect their networks to those of the ILECs. In its first rulemaking proceeding implementing the requirements of § 251, the FCC ordered ILECs to provide various "methods of technically feasible interconnection or access" to their networks, including the provision of existing or newly built transmission facilities. *See Local Competition Order*, 11 FCC Rcd at 15780-81, ¶ 553; 47 C.F.R. § 51.321 (requiring ILECs to provide "any technically feasible method of obtaining interconnection").

The FCC's regulations establish a structure in which the competitor, not the ILEC, selects the form of interconnection it wants to use; the ILEC must provide what is requested unless the ILEC demonstrates that it is not technically feasible. 47 C.F.R. § 51.321(d). In implementing the statutory standard that interconnection be made available "at any technically feasible point" (47 U.S.C. § 251(c)(2)), the FCC has ordered ILECs to provide various "methods of technically feasible interconnection or access to [their] networks," including the provision of existing or newly built transmission facilities; "meet point arrangements" are one form of interconnection that may require an ILEC to build out its facilities to meet those of a competitor. *Local Competition Order*, 11 FCC Rcd at 15780-81, ¶ 553. ILECs also are required to provide interconnection by allowing their competitors to place their network equipment in the ILECs' central offices; this is known as virtual and physical collocation. *Id.*

Several courts have affirmed the FCC's statutory interpretation of what interconnection means under the 1996 Act. The Eighth Circuit has explained that, under § 251(c)(2), an ILEC's "duty is to provide interconnection for the facilities and equipment of the requesting carrier with the LEC's network. By its own terms, this reference is to the physical link, between the equipment of the carrier seeking interconnection and the LEC's network." *Competitive Telecom. Ass'n v. FCC*, 117 F.3d 1068, 1072 (8th Cir. 1997). The D.C. Circuit similarly has concluded that the term "interconnect" refers to "facilities and equipment, not to the provision of any service . . . ." *AT&T Corp. v. FCC*, 317 F.3d 227, 234-35 (D.C. Cir. 2003). And, the D.C. Circuit also has ruled that § 251(c)(2) "obliges an [sic] LEC to provide interconnection facilities with any other carrier at a single 'technically feasible' POI [point of interconnection]." *Mountain Communications, Inc. v. FCC*, 355 F.3d 644, 649 (D.C. Cir. 2004). The ILECs' obligation to provide interconnection extends to building additional transmission facilities to meet a competitor's needs if such facilities do not already exist. *US West Communications, Inc. v. Minn. Pub. Utils. Comm'n*, 55 F. Supp. 2d 968, 982-83 (D. Minn. 1999) (ILEC must provide existing transmission facilities or build new ones to comply with regulations implementing § 251(c)(2)).

That interconnection encompasses a physical transmission facility that is provided by the incumbent is apparent from the FCC's regulations identifying two-way trunking as a form of interconnection that the ILEC must provide. 47 C.F.R. § 51.305(f). It also is consistent with the manner in which interconnection was provided by the Bell System to other common carriers. For example, not long after new market entrants, such as MCI, began providing point-to-point long distance service using microwave technology, the FCC was called upon to address the extent to which AT&T (Bell System) was or should be required to interconnect its telephone company facilities with those of the non-Bell, non-telephone company communications common carriers. At the conclusion of the proceeding, the FCC ordered AT&T to make physical interconnection available to other common carriers under tariffs to be filed at the FCC. *In re Bell System Tariff Offerings of Local Distribution Facilities for Use by Other Common Carriers; and Letter of Chief, Common Carrier Bureau, Dated October 19, 1973, to Laurence H. Harris, Vice President, MCI Telecommunications Corp.*, Decision, 46 FCC 2d 413 (1974) ("*Bell System Tariff Offerings*"), *aff'd sub nom., Bell Telephone Co. of Pa. v. FCC*, 503 F.2d 1250 (3rd Cir. 1974), *cert. denied sub nom., AT&T v. FCC*, 422 U.S. 1026 (1975). Although AT&T filed tariffs as required, it ultimately submitted revised tariffs as part of a settlement with a number of common carriers that had raised objections to AT&T's initial tariff filing. *In re American Telephone & Telegraph Co., et al. Offer of Facilities for Use by Other Common Carriers*, Memorandum Opinion and Order, 52 FCC 2d 727 (1975) ("*OCC Facilities Tariffs*"). Those tariffs (*id.* at Appendix A) provided for interconnection facilities that include as methods of interconnection "Voice grade central office connecting facilities between an OCC terminal location and a point of connection with the Telephone Company . . . ."

Id. at 749. The voice grade connecting facilities are stated to be "wire" facilities. *Id.* at 748-749.

Thus, before the passage of the 1996 Act, the incumbent monopoly telephone company provided physical facilities to its competitors as a means of fulfilling its interconnection obligations. The 1996 Act and the FCC's rulings in the *Local Competition Order* implementing § 251(c)(2) continued that obligation.

Entrance Facilities

The network element that is the subject of this case is known in the industry as an "entrance facility." There is no definition of "entrance facilities" in the 1996 Act; the term appears once in the FCC's regulations governing unbundling under § 251(c)(3). Section 51.319(e)(2)(i) of the FCC's unbundling regulations states as follows: "2 *Availability. Entrance facilities.* An incumbent LEC is not obligated to provide a requesting carrier with unbundled access to dedicated transport that does not connect a pair of incumbent LEC wire centers." 47 C.F.R. § 51.319(e)(2)(i). To the extent this statement is a definition of the term, it does no more than define the entrance facilities to which competitors will not have access as a UNE under § 251(c)(3).

The term entrance facilities is by no means new; rather it has long been used by the FCC in its orders addressing interconnection between AT&T (as the Bell System) and its various customers and competitors under the Communications Act of 1934, prior to its amendment by the 1996 Act. At one time in the history of telecommunications, AT&T's control over its network extended to prohibiting customers from attaching, i.e., using, a telephone or a PBX that was not provided by the telephone company. The competition that is taken for granted today essentially began in 1968 when the FCC determined that customers would be permitted to use their own equipment, e.g., their own telephone handsets, rather than be restricted to using only the handsets the local telephone companies provided.[6] Following the *Carterfone* decision AT&T submitted new tariffs eliminating the prohibition against "foreign attachments" to its network. In the same tariff submission, AT&T submitted a tariff that permitted a customer that operated its own point-to-point voice channels to interconnect those channels with the AT&T network. In its order allowing those tariffs to go into effect, the FCC described AT&T's tariff for this new service (A.T.&T. Tariff FCC No. 260) as follows:

> This tariff applies to private-line service. This is a separate service that does not use the switched telephone network. . . . the private-line-service tariff is being revised, effective January 1, 1969, to make a new private-line offering whereby customers may obtain private lines of not more than 25 airline miles to connect their own voice-grade private channels to the telephone company message toll telephone network. *These private-line facilities are called entrance facilities.* They may not be used to connect a customer terminal or system to private-line facilities of the telephone company.

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[6] *See In re Use of the Carterfone Device in Message Toll Telephone Service, in re Thomas F. Carter and Carter Electronics Corp., Dallas, Tex. (Complainants) v. American Telephone and Telegraph Co., Associated Bell System Companies, Southwestern Bell Telephone Co., and General Telephone Co. of the Southwest (Defendants),* Decision, 13 FCC 2d 420 (1968) ("*Carterfone*").

In re American Telephone and Telegraph Co. (A.T.&T.) 'Foreign Attachment' Tariff Revisions in A.T.&T. Tariff FCC Nos. 263, 260, and 259, Memorandum Opinion and Order, 15 FCC 2d 605, 1968 WL 13557, *4, ¶ 17 (1968) ("*Foreign Attachment Tariff*") (emphasis added). Before long distance competition began to blossom, the FCC had used the term entrance facilities to denote a physical means of connecting to AT&T's network.

Later, in a series of orders issued in the mid-1970s, the FCC examined AT&T's (the Bell System's) interconnection arrangements with international record carriers (IRCs) that were provided under contracts, and compared them to the AT&T tariffs that governed its interconnection arrangements with satellite common carriers and specialized common carriers. The FCC determined that the interconnection facilities in question were "like facilities" and the differences in the rates charged under contract and under tariff were discriminatory. In describing the nature of the prior proceedings, and the settlement reached by the parties, the FCC described AT&T's interconnection responsibilities with respect to these common carriers as including the provision of entrance facilities.

> Our Docket No. 20452 proceeding, designated for hearing at 52 FCC 2d 1014 (1975), was initiated against the background of the proceeding in Docket No. 20099, *AT&T Offer of Facilities For Use by Other Common Carriers*, 52 FCC 2d 727 (1975). At issue in Docket No. 20099, to which the International Record Carriers (IRCs) were parties, were the Bell System's interconnection responsibilities (provision of various kinds of interconnection facilities) to non-telephone company common carriers such as the Domestic

> Satellite Common Carriers (DSCCs), the Specialized Common Carriers (SCCs) and the IRCs. One result of the Docket No. 20099 proceeding was a negotiated settlement, signed by all parties including the IRCs, under which the Bell System companies were obligated to provide DSCCs, SCCs, and IRCs, under certain Other Common Carrier (OCC) facility tariffs, facilities to be used within cities and interconnected with interstate services. Another provision in the settlement provided that the Bell System companies would provide to the DSCCs and SCCs under other OCC facility tariffs entrance facilities (*e.g.*, between earth stations operating offices) and intercity facilities (*e.g.*, between and among operating offices in different cities).

In re Interconnection Facilities Provided to the International Record Carriers Bell System Operating Companies Proposed Tariff FCC No. 4, Overseas Connecting Facilities for Other Common Carriers, American Telephone and Telegraph Company, Long Lines Department Proposed Revision to Tariff FCC No. 266, Facilities for Other Common Carriers, Memorandum Opinion and Order, 66 FCC 2d 517, 1977 WL 38374, *1, ¶ 2 (1977).

Thus, the term "entrance facilities" and the use of entrance facilities as a physical means to connect the incumbent provider's network to a private network and to the network of other providers, including the incumbent's competitors, existed before the 1996 Act was passed. The FCC's examination of entrance facilities under the Act not only is consistent with the distinct statutory obligation to provide interconnection under § 251(c)(2), but is consistent with prior FCC decisions and statements.

Proceedings Below

The MPSC initiated a proceeding to address the parties' disputes over implementation of the *TRRO*. *In the Matter, on the Commission's Own Motion, To Commence A Collaborative Proceeding To Monitor and Facilitate Implementation of Accessible Letters Issued By SBC Michigan and Verizon*, Michigan Public Service Commission, Case No. U-14447. Among the numerous disputed issues was the question of whether Michigan Bell Telephone Company d/b/a AT&T Michigan ("AT&T")[7] had the right to price entrance facilities used for interconnection above the TELRIC rate, i.e., above the cost-based rate required pursuant to § 251(c)(2). AT&T argued that the *TRRO*, when it eliminated the ILECs' obligation to provide entrance facilities as UNEs, also eliminated any obligation to provide entrance facilities at TELRIC rates for any purpose, including interconnection. Pet. App. 183a-184a.

The MPSC rejected AT&T's arguments, and concluded that the FCC's decision eliminating the ILECs' duty to provide entrance facilities as UNEs under § 251(c)(3) left intact the ILECs' separate obligation to provide entrance facilities used for purposes of interconnection under § 251(c)(2). Pet. App. 185a.

On April 28, 2006, AT&T appealed portions of the MPSC Arbitration Order to the United States District Court for the Eastern District of Michigan. Among the portions of the MPSC Arbitration Order AT&T appealed was the MPSC's ruling requiring AT&T to continue to provide CLECs with entrance facilities at a cost-based rate when those entrance facilities are used for purposes of interconnection under § 251(c)(2). In an unpublished opinion dated September 26, 2007, the District Court issued its Order, including its ruling that the MPSC Arbitration Order did not comply with the rules regarding entrance facilities adopted by the FCC in its *TRRO*, and that, therefore, the MPSC's ruling on that issue must be set aside. Pet. App. 158a. The District Court entered its final judgment on October 23, 2007, granting, in part, AT&T's motion for summary judgment and enjoining the MPSC from enforcing those portions of its Arbitration Order which the district court ruled to be unlawful. Pet. App. 168a-169a.

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[7] At the time of the initial proceeding, AT&T was known as SBC Michigan.

The district court's decision on entrance facilities was timely appealed to the Sixth Circuit by the MPSC, and by a group of CLECs, including petitioner Talk America Inc. A three-judge panel of the Sixth Circuit heard oral argument in this case on December 10, 2008. At oral argument, panel members queried counsel whether it would be productive to seek input from the FCC, since the meaning of the *TRRO*, as well as other FCC orders and rules, was at issue in the case. On the same day as oral argument, the Clerk of the Sixth Circuit sent a letter to the General Counsel of the FCC inviting the FCC to file a brief as *amicus curiae*, stating its position on the issue on appeal.

The FCC filed its invited *amicus* brief on April 3, 2009. *See* Pet. App. 112a-142a. The FCC urged the Sixth Circuit to reverse the district court, stating its position in no uncertain terms:

> The FCC in paragraph 140 of the *TRRO* declared explicitly that its rule relieving incumbent LECs of the duty to unbundle entrance facilities and its non-impairment finding "do[] not alter the right

> of competitive LECs to obtain interconnection facilities pursuant to section 251(c)(2)." The FCC went on to state categorically that "competitive LECs will have access to these facilities at cost-based rates to the extent that they require them to interconnect with the incumbent LEC's network." The MPSC was correct in accepting the agency's authoritative interpretation of the scope of the unbundling rule and its specification of the incumbent LECs' section 251(c)(2) obligations.

Pet. App. 128a-129a (footnotes omitted). The FCC urged that "the district court (in contrast to two circuit courts previously confronting the same issue) improperly disregarded the FCC's authoritative construction of its own rules and authorizing statute," and that there was no question that the Sixth Circuit should reverse the district court's erroneous decision. Pet. App. 120a.

The case remained pending in the Sixth Circuit until February 23, 2010, when the panel issued its 2-1 decision. The panel majority's opinion rejected the reasoning of the prior on-point decisions of the Seventh and Eighth Circuits in *Illinois Bell Tel. Co. v. Box*, 526 F.3d 1069 (7th Cir. 2008) and *Southwestern Bell Tel. Co. v. Missouri Pub. Serv. Comm'n*, 530 F.3d 676 (8th Cir. 2008), *cert. denied sub nom.*, *Missouri Pub. Serv. Comm'n v. Southwestern Bell Tel. L.P.*, ___ U.S. ___, 129 S.Ct. 971 (2009). Likewise, the panel majority rejected the FCC's view of the meaning of its own orders and rules, which had been detailed in the FCC's *amicus* brief.

The MPSC and the CLEC intervenors filed timely motions for panel rehearing or rehearing en banc. The motions were denied on June 2, 2010, with Judge

Sutton stating that he would have granted rehearing en banc for the same reasons he dissented from the panel majority's opinion.

Talk America Inc. filed its petition for writ of certiorari on August 31, 2010, which was granted on December 10, 2010.

SUMMARY OF ARGUMENT

1. The Telecommunications Act of 1996 imposes on the ILECs certain network sharing requirements, two of which are at issue here: the obligations to provide to any requesting telecommunications carrier (i) interconnection to the ILECs' networks (§ 251(c)(2)) and (ii) access to the ILECs' network elements on an "unbundled basis," i.e., as UNEs (§ 251(c)(3)). These obligations are separate and distinct under the Act. Interconnection facilities and UNEs are each required by the Act to be provided at cost-based rates, a requirement that the FCC has implemented by establishing a costing methodology known as TELRIC, which is applicable to both.

The FCC has consistently interpreted § 251(c)(2) to require the ILECs to provide to their competitors a range of physical facilities that CLECs can use to interconnect their networks to those of the ILECs. The only constraint is that a CLEC's request for a particular form of interconnection must be "technically feasible." 47 U.S.C. § 251(c)(2). An entrance facility can be a type of physical interconnection facility.

In the *TRO*, the FCC observed that CLECs use entrance facilities in two different ways: (1) as a transport transmission link where the CLEC carries its own customers' traffic from an ILEC's central office to the CLEC's switch, and is known as "backhaul" in the industry, and (2) as interconnection facilities used to exchange traffic between an ILEC's switch and the CLEC's switch and thus between customers on the two carrier's networks. In the first situation, a CLEC is not using entrance facilities for interconnection purposes, but rather to carry traffic to and from its end users. In the second situation, a CLEC uses entrance facilities to interconnect with the ILEC's network; that is, to provide a transmission path between the ILEC's switch and the CLEC's switch for the exchange of traffic between the two networks and the ILEC's and CLEC's customers. The FCC concluded that "[u]nlike the facilities that incumbent LECs explicitly must make available for Section 251(c)(2) interconnection, we find that the Act does not require incumbent LECs to unbundle transmission facilities connecting incumbent LEC networks to competitive LEC networks for the purpose of backhauling traffic." *Id.* ¶ 365 (footnote omitted).

In the *TRRO*, the FCC reiterated its focus on *the use* being made of the entrance facility. Thus, while the FCC found that the entrance facilities no longer would be among the UNEs ILECs must provide under § 251(c)(3), it also said this decision had no effect upon the ILECs' separate statutory *interconnection* obligations under § 251(c)(2). In ¶ 140 of the *TRRO*, the FCC said,

> our finding of non-impairment with respect to entrance facilities does not alter the right of competitive LECs to obtain interconnection facilities pursuant to § 251(c)(2) for the transmission and routing of telephone exchange service and exchange access service. Thus, competitive LECs will have access to these facilities

> at cost-based rates to the extent that they require them to interconnect with the incumbent LEC's network.

CLECs' right to obtain facilities necessary for interconnection under § 251(c)(2) is absolute and does not depend upon a finding of impairment. When it removed entrance facilities from the list of UNEs, the FCC did not eliminate CLECs' ability to obtain entrance facilities for purposes of interconnection at cost-based rates. The Sixth Circuit's decision is contrary to federal law and must be reversed.

II. The Communications Act of 1934, as amended, provides the FCC with broad authority to implement the provisions of the statute. Because Congress has not directly spoken to the precise question at issue here – the continued availability of entrance facilities for interconnection – the courts must sustain the FCC's approach so long as it is based on a permissible construction of the statute. In an *amicus* brief filed at the Sixth Circuit's request, the FCC explained the substance of its prior order on the subject, the *TRRO*, and urged the court to reinstate the MPSC's ruling. The panel majority erred when it failed to accord the FCC's opinion deference under *Auer v. Robbins*.

Contrary to the panel majority's opinion, the FCC's order is not an interpretive rule, but was enacted in the notice-and-comment rulemaking process. Its pronouncements are legislative in character. Further, the order is consistent with prior FCC action on the same subject. The FCC's interpretation of the *TRRO*, under this Court's jurisprudence, is controlling unless plainly erroneous or inconsistent with the order and resulting regulation. Because the FCC's construction of this highly technical topic meets this standard, deference requires a reversal of the Sixth Circuit's opinion.

ARGUMENT

I. THE SIXTH CIRCUIT MISAPPLIED OR MISAPPREHENDED FEDERAL LAW AND WRONGLY DECIDED THE QUESTION OF THE ILECS' OBLIGATIONS REGARDING THE PROVISION OF ENTRANCE FACILITIES TO CLECS.

A. The FCC's decision in the *TRRO* that entrance facilities need not be made available as UNEs did not and could not alter the availability of entrance facilities for purposes of interconnection at cost-based rates.

In the *TRRO*, the FCC applied the impairment standard of § 251(c)(3) and held that CLECs are not impaired without access to entrance facilities, and therefore not entitled to entrance facilities as UNEs under § 251(c)(3). *See* 20 FCC Rcd at 2609-12, ¶¶ 136-41. In making this determination, however, the FCC also explicitly stated that,

> our finding of non-impairment with respect to entrance facilities does not alter the right of competitive LECs to obtain interconnection facilities pursuant to § 251(c)(2) for the transmission and routing of telephone exchange service and exchange access service. Thus, competitive LECs will have access to these facilities at cost-based rates to the extent that they require them to interconnect with the incumbent LEC's network.

Id. at 2611, ¶ 140.

It is obvious that the FCC recognized that entrance facilities can be used by CLECs for different purposes and that only their use as UNEs was being affected by the FCC's unbundling determinations in the *TRRO*. The FCC did not attempt to alter and, indeed, could not have altered the separate duty that the Act imposes on ILECs to provide access to transmission facilities for interconnection purposes under § 251(c)(2). The plain language of the *TRRO*, quoted above, makes clear that the FCC's unbundling determination did not eliminate CLECs' access to entrance facilities at cost-based rates for purposes of interconnection.

The FCC has recognized that CLECs use entrance facilities in at least two distinct ways, one of which is "interconnection" under § 251(c)(2) of the Act. In the *TRO*, the FCC observed that CLECs use entrance facilities: (1) as a transport transmission link where the CLEC carries its own customer's traffic from an ILEC's central office to the CLEC switch, and (2) as interconnection facilities used to exchange traffic between ILEC and CLEC switches. In the first situation, a CLEC does not use entrance facilities for interconnection purposes, but rather to carry traffic to and from its end users, a process known as "backhauling." In the second situation, a CLEC uses entrance facilities to interconnect with the ILEC's network, to provide a transmission path between the ILEC's switch and the CLEC's switch for the exchange of traffic between the two networks. *See TRO*, 18 FCC Rcd at 17202-03, ¶¶ 365-66.

In the *TRRO*, the FCC determined that when a CLEC uses entrance facilities to carry traffic to and from its own end users (situation (1) above), it is not entitled to obtain entrance facilities from ILECs as

UNEs. *See TRRO*, 20 FCC Rcd at 2610-12, ¶¶ 136-41. The FCC also reaffirmed in the *TRRO*, however, its earlier determination that if a CLEC needs entrance facilities to interconnect with an ILEC's network (situation (2) above), the CLEC has the right to obtain such facilities from the ILEC, at cost-based rates, under § 251(c)(2) of the Act. *Id.*

The FCC thus unquestionably understood that the 1996 Act imposes different obligations in different portions of the Act. In particular, the FCC understands the distinction between its authority to determine what portions of the network will be made available as UNEs under § 251(c)(3) and the separate statutory obligations the Congress imposed on ILECs under other portions of the Act. Furthermore, not only did the FCC in the *TRO* and *TRRO* recognize that Congress created separate obligations for the ILECs under § 251(c)(2) and § 251(c)(3), it also recognized that the Act contains a set of obligations that apply only to some ILECs; that is, § 271 establishes obligations that apply solely to the ILECs that are also former Bell Operating Companies (BOCs). In both the *TRO* and the *TRRO*, the FCC acknowledged the statutory obligations set out in § 271 that require the BOCs to provide certain network elements and certain services to competitors.[8]

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[8] *See TRO*, 18 FCC Rcd at 17389, ¶ 655 (recognizing that an independent obligation applicable to the BOCs under section 271 is not inconsistent with the structure of the Act: "Section 271 was written for the very purpose of establishing specific conditions of entry into the long distance that are unique to the BOCs. As such, BOC obligations under section 271 are not necessarily relieved based on any determination we make under the section 251 unbundling analysis.").

That interconnection is to be provided at cost-based rates, rates that are determined using the TELRIC methodology, is well established. The Act requires ILECs to provide interconnection facilities on "rates, terms and conditions" that comply with the requirements of § 252. 47 U.S.C. § 251(c)(2)(D). In turn, the "just and reasonable rate for the interconnection of facilities and equipment for purposes of subsection (c)(2) of section 251" shall be cost-based. 47 U.S.C. § 252(d)(1)(A)(i). In implementing these portions of the Act, the FCC concluded that Congress intended to apply the same pricing rules to interconnection and to UNEs, based on the plain language of §§ 251(c)(2), 251(c)(3), and 252(d)(1):

> Sections 251(c)(2) and (c)(3) impose an identical duty on incumbent LECs to provide interconnection and access to network elements "on rates, terms, and conditions that are just, reasonable, and nondiscriminatory." In addition, both interconnection and unbundled network elements are made subject to the same pricing standard in section 252(d)(1). Based on the plain language of sections 251(c)(2), (c)(3), and section 252(d)(1), we conclude that Congress intended to apply the same pricing rules to interconnection and unbundled network elements. The pricing rules we adopt [i.e., TELRIC] shall, therefore apply to both.

Local Competition Order, 11 FCC Rcd at 15816, ¶ 628 (footnotes omitted). Use of the TELRIC methodology was upheld by this Court in *Verizon*, 535 U.S. at 497.

The Sixth Circuit panel majority appears to have reached the mistaken conclusion that, because UNEs and interconnection facilities are both required to be priced at TELRIC, a change in pricing because UNE status is removed means a change in pricing for interconnection. The panel majority overlooked the fact that unbundling and interconnection obligations each present a separate and independent basis for applying TELRIC pricing to ILEC facilities used by CLECs. Furthermore, because the "necessary and impair" standard must be applied and satisfied under § 251(c)(3), but does not apply under § 251(c)(2), the FCC's finding that competitive alternatives exist for the ways CLECs use entrance facilities to gather and haul their end user's traffic that is not going to and from the ILEC's customers has no bearing on CLECs' right to obtain these facilities for interconnection. The right of CLECs to obtain facilities for interconnection under § 251(c)(2), and to have them priced at TELRIC, is absolute.

A concept not uncommon in this industry is the application of different prices to the same telecommunications facility when it is used for different functions or purposes.[9] For example, when it implemented the interconnection provisions of § 251(c)(2), the question arose whether interexchange carriers (long distance carriers) could obtain interconnection facilities under § 251(c)(2), rather than continue to use higher priced alternative facilities. The FCC looked at the language of the statute and distinguished between interconnection established for purposes of a carrier "terminating its interexchange traffic" (i.e., long distance calls) and for purposes of "providing to others telephone exchange service or exchange access" (i.e., local calls or network access).

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[9] As every user of telecommunications services is aware, different pricing historically has applied to business and residential customers, to local and to long distance services, and to data, such as text messages, and voice calls.

Local Competition Order, 11 FCC Rcd at 15598-15999. Although the same "interconnection" – using the same "facilities and equipment," or the same "wire" – could be used for both purposes, the FCC's rule prohibits the use of the wire at TELRIC rates for terminating long distance traffic, but permits the use of the wire at TELRIC rates for offering local services in competition with the ILEC.

The Eighth Circuit upheld this aspect of the FCC's rule, i.e., 47 C.F.R. § 51.305(a)(1). The Eighth Circuit said that:

> CompTel also challenges the FCC's interpretation of interconnection as having a discriminatory impact, by permitting LECs to charge different rates for the same service based on whether the carrier who is seeking interconnection . . . is a long-distance service provider or a local service provider. But the two kinds of carriers are not, in fact, seeking the same services. The IXC is seeking to use the incumbent LEC's network to route long-distance calls and the newcomer LEC seeks use of the incumbent LEC's network in order to offer a competing local service. Obviously the services sought, while they might be technologically identical (a question beyond our expertise), are distinct.

Competitive Telecom. Ass'n v. FCC, 117 F.3d at 1073. Thus, the different services provided over the same wire, the distinct functions to which the facilities would be put, was found by the court to justify different regulatory treatment under the interconnection rules.[10]

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[10] The Sixth Circuit panel majority rejects what it calls the "separate-use theory" embodied in paragraph 140, stating that

The same is true here. Examining the use of entrance facilities under each of the statutory obligations, under § 251(c)(2) and under § 251(c)(3), is appropriate when the FCC issues its rules interpreting the 1996 Act. This is precisely the analysis performed by the FCC in the *TRO* and the *TRRO*.

B. The ILECs' obligation to provide interconnection under Section 251(c)(2) includes providing physical facilities, such as the wires known as entrance facilities, to CLECs.

The FCC has consistently interpreted the obligation of interconnection in § 251(c)(2) to be a require-

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it requires assuming that the FCC used the term entrance facility to refer to a use by CLECs (backhauling) that is not part of FCC's definition of the term. Pet. App. 25a-27a. The problem with the majority's argument, however, is twofold. First, the two definitions define the *end points* of the facility, not the *type of traffic* carried on the facility. That is, *TRRO* ¶ 136 (20 FCC Rcd at 2609) states that entrance facilities are transmission facilities that connect CLEC network with ILEC networks. 47 C.F.R. § 51.319(e)(2)(i) states that entrance facilities are dedicated transport that does not connect a pair of ILEC wire centers. Second, each of these definitions encompasses both the use of entrance facilities for the exchange of traffic and the use of entrance facilities to access UNEs, which the FCC determined is the purpose of interconnection. *See Local Competition Order*, 11 FCC Rcd at 15606, ¶ 204. Thus, neither definition precludes a CLEC's use of entrance facilities for interconnection. Since the FCC clearly distinguished in *TRRO* ¶ 140 between entrance facilities subject to the impairment standard to be applied under § 251(c)(3) and entrance facilities obtained under § 251(c)(2) "for the transmission and routing of telephone exchange service and exchange access service," the FCC necessarily contemplated that different types of traffic could be carried—different uses could occur—under the two sections of the Act, otherwise it would not have articulated different rules under the two sections.

ment that the ILECs provide to their competitors a range of physical facilities that CLECs can use to interconnect their networks to those of the ILECs. In its first rulemaking proceeding implementing the requirements of § 251, the FCC ordered ILECs to provide various "methods of technically feasible interconnection or access" to their networks, including the provision of existing or newly built transmission facilities. *See Local Competition Order*, 11 FCC Rcd at 15780-81, ¶ 553; 47 C.F.R. § 51.321 (requiring ILECs to provide "any technically feasible method of obtaining interconnection"). The FCC further concluded that "the term 'technically feasible' refers solely to technical or operational concerns, rather than economic, space, or site considerations" and that technically feasible as that term applied to "the obligations imposed by sections 251(c)(2) and 251(c)(3) include modifications to incumbent LEC facilities to the extent necessary to accommodate interconnection or access to network elements." *Local Competition Order*, 11 FCC Rcd at 15602, ¶ 198.

Interconnection can take different forms and it is the CLEC, not the ILEC, that determines where and in what form interconnection will be for the exchange of traffic. *Id.* at 15608, ¶ 209 (concluding that § 251(c)(2) gives competing carriers the right to select the interconnection point). The only constraint is that a CLECs' request for a particular form of interconnection must be "technically feasible." 47 U.S.C. § 251(c)(2).[11] No argument has been made that the entrance facilities at issue in this case fail to meet the "technically feasible method of obtaining interconnection" standard that is set forth in the FCC's interconnection regulations.

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[11] The Sixth Circuit panel majority dismisses the well-established principles embodied in the FCC rules for determining whether interconnection methods are "technically feasible." It opines that, "at least in our view, entrance facilities are not actually a 'technically feasible means of obtaining

Among the means of interconnection that the FCC identified as the minimum to be made available to CLECs, is trunking. *Local Competition Order*, 11 FCC Rcd at 15612-15613, ¶ 219; 47 C.F.R. § 51.305(f) (requiring ILECs to provide if technically feasible "two-way trunking upon request"). Addressing the non-discrimination requirement set out in § 251(c)(2)(D), the FCC determined that "this duty requires incumbent LECs to design interconnection facilities to meet the same technical criteria and service standards, such as probability of blocking in peak hours and transmission standards, that are used within their own networks." *Id.* at 15614-15615, ¶ 224.

Thus, the concept of "interconnection" is not and has never been confined to simply allowing a competitor to "plug in" to an ILEC's network the way one plugs a toaster into an electrical outlet, nor is it limited to allowing a competitor's optical fiber to meet the ILEC's optical fiber in an underground vault. Rather, the FCC has ruled that the right to interconnection includes a competitor's right to obtain a physical facility from the ILEC for use in

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interconnection' because they do not connect the CLEC with the ILEC network directly, entrance facilities, when used, connect the CLEC with the interconnection facility." Pet. App. 24a. The majority provides no citation to the record, nor to statute or rule, supporting its conclusion that entrance facilities are not a technically feasible means of interconnection.

transmitting, i.e., exchanging, traffic between the two networks.[12]

This interpretation is perfectly consistent with the manner in which interconnection was provided by AT&T (Bell System) to enable those of its customers who had their own point-to-point facilities to connect to AT&T's network, and with AT&T's provision of interconnection to a variety of other carriers, including competitors in the long distance arena before the 1996 Act. As noted *supra*, AT&T proposed a private line tariff which the FCC described as a "new private-line offering whereby customers may obtain private lines of not more than 25 airline miles to connect their own voice-grade private channels to the telephone company message toll telephone network. These private-line facilities are called 'entrance facilities.'" *Foreign Attachment Tariff* 1968 WL 13557, at *4, ¶ 17. Also, as noted *supra*, AT&T proposed tariffs to effect interconnection with a variety of other common carriers as part of a settlement of interconnection issues. *See OCC Facilities Tariffs*, 52 FCC 2d at Appendix A. In both instances physical wire facilities were being provided as a means of interconnection.

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[12] Dicta in the D.C. Circuit's opinion in *USTA II* regarding the use of entrance facilities, seems to have misled the Sixth Circuit panel majority. Twice in the majority's opinion there is reference to the D.C. Circuit's statement that "[i]f (as appears) [entrance facilities] exist exclusively for the convenience of the CLECs, it seems anomalous that CLECs do not themselves provide them . . . ." Pet. App. 6a, n.3, 13a. The D.C. Circuit was, of course, reviewing the FCC's unbundling determinations under § 251(c)(3); the matter of entrance facilities used for purposes of interconnection under § 251(c)(2) was not addressed. In any event, no interconnection facility is provisioned purely for the benefit of one party; the purpose of interconnection is to enable the exchange of traffic between carriers, in this instance between ILEC and CLEC. These facilities enable the ILEC's customers to call the customers of the CLEC; the ILEC benefits when its customers can communicate with customers of the CLEC.

Moreover, interconnection through physical facilities is not limited to what the incumbent telephone company decided it would offer. The FCC's authority under § 201(a) of the Communications Act explicitly grants the FCC the power to order interconnection among carriers that are subject to its jurisdiction. 47 U.S.C.A. 201(a). *See, e.g. Bell System Tariff Offerings*, 46 FCC 2d at 413.

The FCC acted under its § 201(a) authority to initiate a rulemaking proceeding to consider the request of three other common carriers that it order AT&T to interconnect with them at the group and supergroup level and provide them with group and supergroup facilities. *In re American Telephone and Telegraph Company and Associated Bell System Companies, Offer of Facilities for Use by Other Carriers*, 84 FCC 2d 1, 1981 WL 158405, Notice of Inquiry and Proposed Rulemaking (1981). In its discussion of facilities – i.e. groups, supergroups,[19] and mastergroups available for entrance facilities—the Commission concluded that "there is no apparent reason why these so-called 'entrance facilities' could not be provided on a nationwide basis . . . ." *Id.* at *7, ¶ 25. The FCC ordered AT&T to file tariffs making these interconnection facilities available to other common carriers and to the public. *In re American Telephone and Telegraph Company Offer of Facilities to Other Common Carriers*, Memorandum Opinion and Order and Further Notice of Proposed Rulemaking, 92 FCC 2d 46 (1983).[14]

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[19] The group and the supergroup facilities have bandwidths of 48 kHz and 240 kHz respectively. *Id.*, 1981 WL 158405, *1, ¶ 1.

More recently, under the 1996 Act, the FCC Common Carrier Bureau arbitrated disputes between Verizon and various CLECs in Virginia regarding interconnection obligations to be set forth in the parties' interconnection agreements, acting in lieu of the Virginia Corporation Commission which declined to perform the arbitration obligation assigned to states under Section 252 of the 1996 Act. In one of those disputes, Verizon and the CLECs disagreed about the terms under which CLECs would provide "entrance facilities" to Verizon. In its order, the FCC Common Carrier Bureau noted: "These '*entrance facilities*' *are interconnection facilities* [CLECs] provide to Verizon that are used to transport Verizon-originated traffic to the [CLECs'] networks." *In re Petition of WorldCom, Inc., Pursuant to Section 252(e)(5) of the Communications Act for Preemption of the Jurisdiction of the Virginia Corporation Commission Regarding Interconnection Disputes With Verizon Virginia Inc., and for Expedited Arbitration*, Memorandum and Order, 17 FCC Rcd 27039, 27069, ¶ 58 (2002) (emphasis added).

Thus, prior to the 1996 Act and prior to the issuance of the *TRO* and the *TRRO*, the FCC undoubtedly viewed entrance facilities as a subset of

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[14] Notably Executive Agencies including the Departments of State and Defense, NASA, the CIA, and others who were the largest single end user of telecommunications in the U.S. at that time asserted that an important national security telecommunications principle is to ensure that interconnection take place between all interstate common carrier telecommunications networks so as to facilitate interoperation in case of any national emergency. *Id.*, 1983 WL 182810, at *15.

"interconnection facilities."[15] What is apparent from these and other proceedings conducted by the FCC before and after the passage of the 1996 Act is that interconnection facilities, including entrance facilities, are physical facilities that can be wires over which the incumbent exchanges traffic with other common carriers. It is also apparent that interconnection facilities, including entrance facilities, exist for the benefit of both of the interconnecting carriers and for their customers.

II. THE PANEL MAJORITY ERRED IN FAILING TO ACCORD *AUER* DEFERENCE TO THE FCC'S INTERPRETATION OF ITS OWN ORDERS AND RULES.[16]

A. Under well-settled law, broad deference to the FCC is appropriate here.

As this Court has noted: "It would be gross understatement to say that the 1996 Act is not a model of clarity. It is in many important respects a model of ambiguity or indeed even self-contradiction." *AT&T v. Iowa Utils. Bd.*, 525 U.S. at 397. Where, as here, Congress has not "directly spoken" to the "precise question" at issue in a case, then reference to the underlying statute alone – even if it were clear – cannot resolve the case. *Coeur Alaska, Inc. v. Southeast Alaska Conservation Council*, __ US __, 129 S.Ct. 2458, 2469 (2009), citing *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984). Instead, a reviewing court must look to the agency's regulations, which are entitled to deference if they resolve the ambiguity in a reasonable manner. *Id.* The FCC, under its broad regulatory power, has interpreted the statutory requirements of the 1996 Act in numerous orders and regulations, which have ultimately survived judicial scrutiny. *See, e.g.*, *Verizon*, 535 U.S. at 538 (upholding TELRIC pricing methodology); *Covad Communications*, 450 F.3d at 551 (upholding all challenged provisions of the *TRRO*). Under these circumstances, deference to the FCC's interpretation of its rulings is absolutely proper. *Auer v. Robbins*, 519 U.S. 452, 464 (1997).

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[15] An erroneous premise that appears to underlie the panel majority's opinion is that "interconnection facilities and entrance facilities are different things." Pet. App. 27a. The majority also erroneously concludes that the term "interconnection facilities" does not appear in the FCC's *TRO*, but instead "is a phrase new to the *TRRO*." Pet. App. 26a. As demonstrated *supra*, both the underlying premise and the conclusion are simply not correct.

[16] Petitioner Talk America Inc. did not include *Auer* deference as a separate question in its Petition for a Writ of Certiorari, but instead addressed it as additional grounds for overturning the Sixth Circuit's opinion. *See* Petition at 30-31. Hence, Talk America includes this argument for the same purpose here.

The particular subject matter at issue here is ambiguous and highly complex, involving both the manner in which telecommunications networks interconnect and the physical facilities that are used to achieve that interconnection. In such circumstances, the regulations issued by the agency may themselves be difficult to understand, especially where technical knowledge or expertise is required. When not only the positions of the parties differ, but also the opinions of lower courts, the meaning of an agency's regulations may remain unclear. *Federal Express Corp. v. Holowecki*, 552 U.S. 389, 396 (2008). The ultimate question, then, is how to interpret the scope of the regulations. In such a case, the agency is entitled to further deference when it adopts a reasonable interpretation of regulations it has put in force. *Id.* at 397, citing *Auer*, 519 U.S. at 461.

The Sixth Circuit specifically requested the FCC to file an *amicus* brief to address the particular provision in the *TRRO* at issue here. Normally, broad deference would be warranted here since the regulations concern "a complex and highly technical regulatory program," in which the identification and classification of telecommunications network facilities to be unbundled under the 1996 Act or needed for interconnection "necessarily require significant expertise and entail the exercise of judgment grounded in policy concerns." *See Thomas Jefferson University v. Shalala*, 512 U.S. 504, 512 (1994), citing *Pauley v. BethEnergy Mines, Inc.*, 501 U.S. 680, 697 (1991). Rather than defer to the FCC's opinion, however, the panel majority, through an elaborate extension-cord-and-plug metaphor, attempted to simplify the complex technical issues in this case and then ruled, based upon a simplistic view of the network operations and technology, that the MPSC erred in determining that entrance facilities are available to competitors at cost-based rates when used for purposes of interconnection. In doing so, the panel majority declined to follow well-established precedent and afforded no deference to the agency charged with implementing the Act.

Indeed, the panel majority did not address deference in the body of its opinion, but explained its lack of *Auer* deference in a footnote responding to the dissent. There, it acknowledged that a federal agency's interpretation of its own ambiguous regulation – even an interpretation presented in an *amicus* brief – is controlling unless plainly erroneous or inconsistent with the regulation. Pet. App. 8a n. 6.

But it considered the FCC's *amicus* brief to be a mere interpretation of an interpretive rule which itself had not been enacted through a notice and comment rulemaking, thereby entitling it to little, if any, deference. *Id.* at 9a ("the FCC offers an *interpretation* of the *TRRO*, which is itself an 'interpretive rule' and not a true 'regulation.' *See A.D. Transp. Express, Inc. v. United States*, 290 F.3d 761, 766 (6th Cir. 2002) ('An interpretative rule is a rule that clarifies or explains an existing law or regulation.'; '[I]nterpretative rules fall within an exception to the [Administrative Procedures] Act and do not require notice and comment.')") (emphasis in original). This dismissal of the opinion of the FCC was unwarranted and is contrary to law.

B. The FCC's position set forth in its *Amicus* Brief should have been controlling.

Section 201(b) of the Communications Act of 1934 provides that "[t]he Commission may prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this Act." 47 U.S.C. § 201(b). Because Congress expressly directed that the 1996 Act, along with its local-competition provisions, be inserted into the Communications Act of 1934, this Court has held that the "FCC has rulemaking authority to carry out the 'provisions of this Act,' which include Sections 251 and 252, added by the Telecommunications Act of 1996." *AT&T v. Iowa Utils. Bd.*, 525 U.S. at 377-378. The breadth of the FCC's regulatory authority has been repeatedly affirmed by subsequent opinions of this Court. *See, e.g., National Cable & Telecommunications Ass'n v. Brand X Internet Services*, 545 U.S. 967, 1002 (2005) (upholding FCC classification of cable modem service and noting the FCC is in a far better position to address questions concerning technical, complex, and dynamic subject matter than the courts). Hence, the FCC clearly had authority to adopt the *TRRO*, including paragraph 140 which is the core of the debate in this case. Consequently, deference is warranted because it "appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority." *United States v. Mead Corp.*, 533 U.S. 218, 226-227 (2001).

In its *amicus* brief, the FCC pointed out that the *TRRO* itself is not subject to scrutiny in this case because that would constitute an impermissible collateral attack on the Order. Any challenge to the FCC's interpretation of its own unbundling regulations in the *TRRO* had to be exercised by a petition for review within 60 days of the promulgation of the Order. Pet. App. 129a-130a. The FCC went on to state that the removal of entrance facilities from the list of network elements available as UNEs did not affect the continued availability of entrance facilities for purposes of interconnection at cost-based rates. Pet. App. 135a. Finally, the FCC urged the Sixth Circuit not only to join the other circuits who had decided the same question but to give deference to the FCC's support of the MPSC's decision. Pet. App. 140a. Thus, the FCC offered clear support for the MPSC's ruling, which was entitled to deference under the law.

C. The *TRRO* is not an "interpretive rule."

Contrary to the panel majority's implications, the *TRRO* is not an "interpretive rule." While it is settled law that interpretations such as those in opinion letters, policy statements, agency manuals, and enforcement guidelines lack the force of law and thus may warrant less *Chevron*-style deference, that is because they are generally not subject to the rigors of notice and comment rulemaking and are not derived from the exercise of an agency's delegated lawmaking power. *See Christensen* v. *Harris County*, 529 U.S. 576, 587 (2000). Agency interpretations accompanying or explaining regulations, however, may carry the same weight as the regulations themselves, particularly when the statute and regulatory scheme are complex and the explanation is itself subject to notice and comments. *See Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555, 567 & n.10 (1980). As this Court has explained:

> [T]he ultimate question is whether Congress would have intended, and expected, courts to treat an agency's rule, regulation, application of a statute, or other agency action as within, or outside, its delegation to the agency of "gap-filling" authority. Where an agency rule sets forth important individual rights and duties, where the agency focuses fully and directly upon the issue, where the agency uses full notice-and-comment procedures to promulgate a rule, where the resulting rule falls within the statutory grant of authority, and where the rule itself is reasonable then a court ordinarily assumes that Congress intended it to defer to the agency's determination.

Long Island Care at Home, Ltd. v. Coke, 551 U.S. 158, 173 (2007).

Such is the case here. The *TRRO* is an order of the FCC, that includes in its Appendix B the rules resulting from the Order, and is a product of standard rulemaking activity. After the *USTA II* remand, the FCC issued an Order and Notice of Proposed Rulemaking on August 20, 2004, soliciting comments on changes to its rules that would be required as a result of the *USTA II* decision. *In re Unbundled Access to Network Elements, Review of Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Order and Notice of Proposed Rulemaking, 19 FCC Rcd 16783 (2004). A search of comments in the FCC's Electronic Comment Filing System (ECFS) in WC Docket No. 04-313 from the period of March 21, 2004 when *USTA II* was issued to December 15, 2004 when the *TRRO* was adopted shows 917 filings by third parties, of which 120 were comments and reply comments. Indeed, the *TRRO* itself, in Appendix A, lists those third parties who filed comments during the proceeding.

Further, the fact that the language in question (*TRRO* ¶140) is in an order rather than a rule does not deprive the language of its legislative character. The FCC has a longstanding practice of issuing orders that direct parties to undertake some activity, many of which affect interconnection obligations, and only some of which include rules subsequently contained in the Code of Federal Regulations. *See, e.g., Bell Telephone Company of Pa. v. FCC*, 503 F.2d 1250 (3d Cir. 1974) (upholding FCC standalone order requiring AT&T to furnish specialized common carriers the interconnection facilities necessary to provide private line services), *cert. denied sub nom., AT&T*

v. FCC, 422 U.S. 1026 (1975). In many cases, an order – even when accompanied by rules – contains additional carrier obligations that do not appear anywhere in the associated rules. *See, e.g., TRRO,* 20 FCC Rcd at 2665, ¶ 234 (establishing self-certifying process for obtaining UNEs). Such orders are legislative pronouncements, applicable to multiple parties, and carry the same weight as the rules themselves.

Indeed, in *Verizon* and *AT&T v. Iowa Utils. Bd.,* this Court reviewed not simply the language of the rules contained in the Code of Federal Regulations, but also the reasoned justification supporting the rules as well as pronouncements affecting third parties' rights that had no counterpart in the rules. Such was also the case when the D.C. Circuit in *USTA II* remanded the entrance facilities issue that is addressed here. In the *TRO*, the FCC held in the order (not in the rules) that entrance facilities were not part of the ILEC's network so were not subject to the statutory impairment analysis or subject to unbundling. The D.C. Circuit determined that, while it might be legitimate to exclude entrance facilities from the list of UNEs available at cost-based rates, the FCC was required to conduct an impairment analysis before declaring so. Thus, the issue remanded from the *USTA II* court was not an FCC *rule*, but the language of the *order* that supported the omission of entrance facilities from the list of UNEs.

As is true for any agency, the FCC does sometimes issue clarifications or interpretive rulings. *See, e.g., In re Cost-based Terminating Compensation for CMRS Providers' Interconnection between Local Exchange Providers and Commercial Mobile Radio Service Providers, Implementation of the Local Competition*

Provisions of the Telecommunications Act of 1996, Calling Party Pays Service Offering in the Commercial Mobile Radio Services, Order, 18 FCC Rcd 18441 (2003) (addressing a letter that clarified wireless providers' entitlement to compensation for switching); *Cellnet Communication, Inc. v. FCC*, 965 F.2d 1106 (D.C. Cir. 1992) (upholding FCC notice that resolved ambiguity in its rules as properly issued without advance notice and comment). But neither the *TRO* nor the *TRRO* fall into that category. Their wording, including paragraphs explaining the continued availability of entrance facilities so long as they are used as interconnection facilities, should be considered as carrying the force of law or, at a minimum, accorded substantial deference.

D. The FCC has ruled consistently on the issue of interconnection facilities.

Courts sometimes limit the deference granted an agency's opinion because it has been inconsistent in its interpretation. *See, e.g.*, *Thomas Jefferson University*, 512 U.S. at 515 ("it is true that an agency's interpretation of a statute or regulation that conflicts with a prior interpretation is 'entitled to considerably less deference' than a consistently held agency view") (internal citations omitted). Such is not the case here. The FCC was consistent in its rulings treating entrance facilities as a form of interconnection facilities in its orders prior to the 1996 Act, and has been consistent concerning the availability of entrance facilities as interconnection facilities (under § 251(c)(2)), even if they are not available as UNEs (under § 251(c)(3)).

The FCC's explanations regarding entrance facilities under the 1996 Act have focused on the dual functions of interconnection versus backhaul, which was the distinction presented to the Sixth Circuit. For example, in the *TRO*, the FCC stated:

> However, in order to access UNEs, including transmission between incumbent LEC switches or wire centers, while providing their own switching and other equipment, competitive LECs require a transmission link from the UNEs on the incumbent LEC network to their own equipment located elsewhere. Competitive LECs use these transmission connections between incumbent LEC networks and their own networks both for interconnection and to backhaul traffic. Unlike the facilities that incumbent LECs explicitly must make available for section 251(c)(2) interconnection, we find that the Act does not require incumbent LECs to unbundle transmission facilities connecting incumbent LEC networks to competitive LEC networks for the purpose of backhauling traffic.
>
> . . . In reaching this determination [that backhaul-type entrance facilities are unavailable as UNEs] we note that, to the extent that requesting carriers need facilities in order to "interconnect[] with the [incumbent LEC's] network," section 251(c)(2) of the Act expressly provides for this and we do not alter the Commission's interpretation of this obligation.

TRO, 18 FCC Rcd at 17203-17204, ¶¶ 365, 366 (footnotes omitted).

On remand from *USTA II*, the FCC did not deviate from the above-quoted language, but changed only its rationale for excluding entrance facilities used for backhaul from the list of UNEs by doing an impairment analysis as required by the court. Indeed, it reinforced the *TRO*'s conclusions concerning continued availability of entrance facilities as interconnection facilities by including ¶ 140, the paragraph at issue here, and virtually repeating its previous language:

> We note in addition that our finding of non-impairment with respect to entrance facilities does not alter the right of competitive LECs to obtain interconnection facilities pursuant to section 251(c)(2) for the transmission and routing of telephone exchange service and exchange access service. Thus, competitive LECs will have access to these facilities at cost-based rates to the extent that they require them to interconnect with the incumbent LEC's network.

TRRO, 20 FCC Rcd at 2611, ¶ 140.

Contrary to the panel majority's supposition, this consistency demonstrates that the FCC has not created a new *de facto* regulation under the guise of interpreting the regulation, nor, as demonstrated in Part I of the Argument *supra*, is the FCC's interpretation so plainly erroneous or inconsistent with the regulation that the interpretation can be ignored. Consequently, the panel majority should have deferred to the agency's interpretation because an alternative reading was not compelled by the regulation's plain language or by other indications of the agency's intent at the time of the regulation's promulgation. *See Gardebring v. Jenkins*, 485 U.S. 415, 430 (1988).

As this case makes abundantly clear, the federal regulations implementing the 1996 Act are technical, complex, and frequently controversial. Judicial deference to the expert views of the FCC not only is important to the administration of justice, but also to provide regulatory certainty to all market participants. As Justice Scalia noted in his concurring opinion in *Coeur Alaska*: "It is quite impossible to achieve predictable (and relatively litigation-free) administration of the vast body of complex laws committed to the charge of executive agencies without the assurance that reviewing courts will accept reasonable and authoritative agency interpretation of ambiguous provisions." *Coeur Alaska*, 129 S.Ct. at 2479 (Scalia, J., concurring in part and concurring in the judgment). The panel majority's failure to defer to the FCC's interpretation of its own regulations resulted in an erroneous opinion that should be reversed.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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January 27, 2011

AMICUS
CURIAE
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Nos. 10-313 & 10-329

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IN THE
Supreme Court of the United States

TALK AMERICA INC.
AND
ORJIAKOR N. ISIOGU, MONICA MARTINEZ, AND
GREG R. WHITE, COMMISSIONERS OF THE
MICHIGAN PUBLIC SERVICE COMMISSION,
Petitioners,
v.

MICHIGAN BELL TELEPHONE COMPANY
D/B/A AT&T MICHIGAN, ET AL.,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Sixth Circuit

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QUESTION PRESENTED

Whether 47 U.S.C. § 251(c)(2) — which requires an incumbent local exchange carrier to provide interconnection "for the facilities and equipment of any [competing] carrier" at a "point within the [incumbent] carrier's network" — requires the incumbent to provide to a competing carrier, at extremely low, regulated rates, all of the facilities and equipment that the competing carrier uses to span the distance (which may be miles) between its own network and the incumbent's network.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of this Court, respondent Michigan Bell Telephone Company d/b/a AT&T Michigan states the following:

Michigan Bell Telephone Company d/b/a AT&T Michigan is a wholly owned subsidiary of AT&T Teleholdings, Inc., which in turn is a wholly owned subsidiary of AT&T Inc., a publicly owned corporation. AT&T Inc. has no parent company, and no publicly owned company owns 10% or more of its stock.

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STATEMENT

Congress enacted the Telecommunications Act of 1996 ("1996 Act" or "Act")[1] to promote the development of facilities-based competition for local telephone service. One provision of the Act, 47 U.S.C. § 251(c)(3), requires incumbent local telephone companies, such as respondent AT&T, to lease their network facilities to competitors, such as petitioner Talk America Inc., at artificially low rates. The obligation to lease facilities under § 251(c)(3) applies *only* when the ability of competitors to compete with incumbents is impaired without access to the incumbent's facilities at those low rates. All parties agree that incumbents need not provide the facilities at issue here, known as "entrance facilities," under § 251(c)(3), because the Federal Communications Commission ("FCC" or "Commission") has found that competitors are not impaired without them: they can build their own entrance facilities or obtain them from providers other than incumbents.

Another provision of the Act, 47 U.S.C. § 251(c)(2), requires incumbents to provide "interconnection" for the facilities of a competitor at a point within the incumbent's network. Unlike § 251(c)(3), it does not create a facilities-leasing obligation. Rather, in the FCC's own words, interconnection refers only to the "physical linking of equipment and facilities" and does not include the "transport . . . of traffic."[2] Even so, petitioner the Michigan Public Service Commission, applying § 251(c)(2), required AT&T to lease entrance facilities to competitors at the same artificially low rates that had applied under § 251(c)(3) when the FCC had found that competitors are impaired. The federal government has filed an *amicus* brief endorsing that ruling. The government's theory, at least in this Court, is that a few sentences in FCC orders in 2003 and 2005 implementing § 251(c)(3) created an obligation for incumbents to lease entrance facilities to competitors under § 251(c)(2).

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[1] Pub. L. No. 104-104, 110 Stat. 56 (amending the Communications Act of 1934, 47 U.S.C. § 151 *et seq.*).

[2] First Report and Order, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd 15499, ¶ 176 (1996) ("*Local Competition Order*").

The court of appeals correctly held that the Michigan commission's order finds no support in the text, structure, or purposes of the 1996 Act, or the FCC's implementing rules or orders, and is therefore unlawful. The government's effort to support the Michigan commission's ruling is unavailing: the FCC's position is not entitled to deference under either *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), or *Auer v. Robbins*, 519 U.S. 452 (1997), and the government's current interpretation of a few sentences in two FCC orders is unreasonable and inconsistent with their text. Further, neither petitioners nor the government attempt to reconcile with the purposes of the Act the Michigan commission's requirement that AT&T provide entrance facilities to competitors at artificially low rates, when the FCC long ago recognized that competitors can build those facilities themselves or buy access to them in the marketplace. The court of appeals' judgment should be affirmed.

A. Statutory and Regulatory Background

The 1996 Act. In the 1996 Act, Congress "subject[ed]" incumbent local exchange carriers ("LECs"), such as AT&T, "to a host of duties intended to facilitate market entry" by competing providers of local telephone service. *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 371 (1999). Section 251(c) of the Act, 47 U.S.C. § 251(c), enables a competitor (a "requesting telecommunications carrier" in the statute's terminology) to "obtain access to an incumbent's network" in "three ways": interconnection, resale, and leasing of facilities (or "unbundling"). *Iowa Utils. Bd.*, 525 U.S. at 371.

First, under § 251(c)(2), the competitor "can interconnect *its own facilities* with the incumbent's network." *Id.* (emphasis added). Section 251(c)(2) states in pertinent part that an incumbent must "provide, for the facilities and equipment of any requesting telecommunications carrier, interconnection with the [incumbent] local exchange carrier's network . . . at any technically feasible point within the [incumbent] carrier's network." 47 U.S.C. § 251(c)(2)(B). A competitor that chooses interconnection under § 251(c)(2) "decide[s] to engage in pure facilities-based competition, that is, to build its own network to replace or supplement the network of the incumbent." *Verizon Communications Inc. v. FCC*, 535 U.S. 467, 491 (2002).

Second, "[a]t the other end of the spectrum," *id.*, the competitor "can purchase [retail] local telephone services at wholesale rates for resale" under § 251(c)(4). *Iowa Utils. Bd.*, 525 U.S. at 371. Section 251(c)(4) thus "permits an entrant to skip construction and instead simply to buy and resell 'telecommunications service,' which the incumbent has a duty to sell at wholesale." *Verizon*, 535 U.S. at 491.

Third, "[b]etween these extremes," *id.*, the competitor "can lease elements of the incumbent's network 'on an unbundled basis'" under § 251(c)(3). *Iowa Utils. Bd.*, 525 U.S. at 371. Section 251(c)(3) requires incumbents to "provide, to any requesting telecommunications carrier for the provision of a telecommunications service, nondiscriminatory access to network elements on an unbundled basis." 47 U.S.C. § 251(c)(3). The statute defines a "network element" as "a facility or equipment used in the provision of a telecommunications service." *Id.* § 153(29). The Act delegates to the FCC authority to identify required unbundled network elements (or "UNEs"). The FCC can require unbundling of a particular network element only when it has determined that "the failure to provide access to [that] network element[] would impair the ability of [competitors] . . . to provide . . . service[]." *Id.* § 251(d)(2)(B).

Section 252(d)(1) establishes the pricing standard both "for the interconnection of facilities and equipment for purposes of [§ 251](c)(2)" and "for network elements for purposes of [§ 251](c)(3)." *Id.* § 252(d)(1).[3] The FCC implemented that pricing standard using a methodology based on the "hypothetical" cost of a "most efficient element," "untethered to" either the incumbent's "historical investment" or the cost of the "actual network element being provided." *Verizon*, 535 U.S. at 501. The FCC termed this pricing methodology "TELRIC" or "total element long-run incremental cost." *Id.* at 495-96.

The TELRIC formula results in very low rates that are "well below the costs the [incumbents] had actually historically incurred in constructing the elements." *United States Telecom Ass'n v. FCC*, 359 F.3d 554, 562 (D.C. Cir. 2004) ("*USTA II*"); *Illinois Bell Tel. Co. v. Box*, 548 F.3d 607, 609 (7th Cir. 2008) ("*Illinois Bell II*") (Posner, J.) (TELRIC rates are "just above the confiscatory level"). In upholding the

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[3] *Cf.* 47 U.S.C. § 252(d)(3) (establishing different pricing standard for resale under § 251(c)(4)).

FCC's TELRIC pricing methodology in the context of § 251(c)(3), this Court recognized that TELRIC rates were limited to "bottleneck elements." *Verizon*, 535 U.S. at 510 & n.27, 515-17; *see also Local Competition Order* ¶ 702 (observing that "unbundled network elements and interconnection services" "generally are bottleneck, monopoly services").

Section 251's duties are implemented through "interconnection agreements" established pursuant to § 252. Incumbents and competitors first attempt to negotiate terms implementing the § 251 duties. *See* 47 U.S.C. §§ 251(c)(1), 252(a). If those negotiations are unsuccessful, § 252 authorizes state regulatory commissions to act as arbitrators, applying the provisions of the Act and implementing FCC regulations. *See id.* § 252(b)-(d). State-commission decisions setting the terms of interconnection agreements are subject to review in federal court. *See id.* § 252(e)(6).

The FCC's orders implementing the 1996 Act. In its initial order implementing the Act, the 1996 *Local Competition Order*, the FCC addressed both the interconnection duty in § 251(c)(2) and the unbundling duty in § 251(c)(3).

Interpreting § 251(c)(2), the FCC promulgated a series of interconnection regulations. It specified certain "point[s] within" the incumbent's network where interconnection would occur, 47 C.F.R. § 51.305(a)(2), and identified two "methods" by which competitors could obtain interconnection with an incumbent's network, *id.* § 51.321(b). The few challenges to the Commission's interconnection rules were, for the most part, rejected, and those regulations exist largely unchanged today. As the government here concedes (at 22 n.6), those regulations "do not expressly require incumbents to provide entrance facilities to satisfy the interconnection obligations under Section 251(c)(2)."

Interpreting § 251(c)(3), the FCC required incumbents to unbundle all of the network elements necessary to provide local telephone service. The basic components of the local telephone network, as this Court described them in *Iowa Utilities Board*, are "local loops (wires connecting telephones to switches)," "switches (equipment directing calls to their destinations)," and "transport trunks (wires carrying calls between switches)." 525 U.S. at 371.

Relevant here, the *Local Competition Order* required incumbents to "provide interoffice transmission facilities on an unbundled basis to requesting carriers." *Local Competition Order* ¶ 439. "Interoffice transmission facilities" are "transport facilities" that carry telecommunications traffic between switches. *Id.* ¶ 428; *see* 11 FCC Rcd at 16210-11 (promulgating 47 C.F.R. § 51.319(d)(1) (1996)).[4] They are the "transport trunks" to which this Court referred in *Iowa Utilities Board*. *See* 525 U.S. at 371.

The FCC further determined that unbundled interoffice transmission facilities included facilities running between incumbents' switches and competitors' switches. *See Local Competition Order* ¶ 440; 47 C.F.R. § 51.319(d)(1) (1996). Those are known as "entrance facilities." *See* App.[5] 3a; *USTA II*, 359 F.3d at 585 ("Entrance facilities are dedicated transmission facilities that connect [incumbent] and [competitor] locations."). The FCC ruled that competitors were impaired without access to entrance facilities as UNEs, which it recognized were used both to exchange traffic with incumbents[6] and to connect the competitors' switches to loops leased from incumbents as UNEs[7] (the latter is sometimes referred to in the industry as "backhauling").

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[4] The buildings in which incumbents' switches and ancillary equipment are housed are referred to as "central offices" or "end offices." *See* 47 C.F.R. pt. 36, App. A.

[5] References to "App." are to the appendix to the petition for a writ of certiorari filed by Talk America in No. 10-313.

The FCC's rules implementing § 251(c)(3)'s unbundling obligations did not fare well in the courts. In 1999, this Court vacated the Commission's initial unbundling rules, finding, among other things, that the FCC had erroneously read the 1996 Act to require "blanket access to incumbents' networks." *Iowa Utils. Bd.*, 525 U.S. at 390; *see id.* (rejecting FCC's conclusion that whatever "can be provided must be provided" under § 251(c)(3)).

Later that year, the FCC re-promulgated virtually all of the unbundling rules this Court had vacated, including the rule requiring incumbents to unbundle entrance facilities. As in the *Local Competition Order*, the FCC found that competitors were impaired without access to entrance facilities, again noting the two uses to which competitors put those facilities. *See UNE Remand Order*[8] ¶¶ 346-348. In 2002, the D.C. Circuit vacated the FCC's second set of unbundling rules. *See United States Telecom Ass'n v. FCC*, 290 F.3d 415, 425 (D.C. Cir. 2002) ("*USTA I*").

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[6] *See Local Competition Order* ¶ 440 ("an interoffice facility could be used by a competitor to connect to the incumbent LEC's switch").

[7] *See id.* ("a competitor" may "use interoffice transmission facilities to connect loops directly to its switch").

[8] Third Report and Order and Fourth Further Notice of Proposed Rulemaking, *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, 15 FCC Rcd 3696 (1999) ("*UNE Remand Order*").

In 2003, the FCC issued its third unbundling order (the *Triennial Review Order*[9]), in which it revisited its prior determinations that § 251(c)(3) requires incumbents to unbundle entrance facilities. Characterizing its earlier approach as "overly broad" and "misguided," the FCC now concluded that entrance facilities "exist *outside* the incumbent LEC's local network" and, therefore, are excluded as a matter of definition from the category of network elements that could be subject to unbundling. *TRO* ¶¶ 365-366 & n.1116. As in prior orders, however, the FCC acknowledged that competitors had been using unbundled entrance facilities both to exchange traffic with the incumbent and to connect their own switches to loops leased from incumbents as UNEs, which the FCC now labeled "backhaul." *See id.* ¶¶ 365, 367; *see also id.* ¶ 480 (explaining that "[t]he need to backhaul the circuit [i.e., the loop] derives from the [competitor's] use of a switch located in a location relatively far from the end user's premises").[10]

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[9] Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 18 FCC Rcd 16978 (2003) ("*Triennial Review Order*" or "*TRO*").

[10] Although the *Triennial Review Order* was the first time the FCC used that term in the unbundling context, the FCC has used "backhaul" and its variants since at least 1975 to refer to a circumstance in which one carrier uses another carrier's network to transport traffic between its customer's premises and its switch. *See, e.g.*, Memorandum Opinion and Order, *International Record Carriers' Scope of Operations*, 54 F.C.C.2d 909, ¶ 33 (1975); Final Policy Statement, *International Record Carriers' Scope of Operations*, 58 F.C.C.2d 250, ¶¶ 17-18 (1976); Memorandum Opinion and Order, *AT&T Co. and the Bell System Operating Companies Restrictions on the Resale and Sharing of Switched Services used for Completion of Interstate Communications*, 94 F.C.C.2d 1110, ¶ 2 n.2 (1983).

On review, the D.C. Circuit did not accept the FCC's exclusion of entrance facilities from the Act's broad definition of "network elements." *USTA II*, 359 F.3d at 585. The court, however, did not question the FCC's conclusion that such facilities are outside the incumbents' local networks, noting that competitors depicted "entrance facilities" "as completely stand-alone items linking a [competitor's] switch with an [incumbent's] office" that "appear[] [to] exist exclusively for the convenience of the [competitors]." *Id.* at 586 (emphasis omitted). The D.C. Circuit therefore found it "anomalous that [competitors] do not themselves provide" their own entrance facilities. *Id.* Finding "the record too obscure to make any final ruling," the court "simply remand[ed] the matter for further consideration." *Id.*

In 2005, the FCC issued its fourth unbundling order (the *Triennial Review Remand Order*[11]), which responded to the D.C. Circuit's decision in *USTA II*. In light of the court's skepticism of the FCC's conclusion that entrance facilities are not "network elements," the FCC "reinstate[d] the *Local Competition Order* definition of dedicated transport to the extent that it included entrance facilities." *TRRO* ¶ 137; *see id.* n.384 ("entrance facilities . . . [are] a type of transport"). The FCC did not, however, revisit its conclusion that entrance facilities exist outside the incumbent's local network.

The FCC then performed the impairment analysis with respect to entrance facilities that it had not conducted in the *Triennial Review Order*. In contrast to the findings in the *Local Competition Order* and *UNE Remand Order*, the FCC concluded that competitors are not impaired anywhere in the nation in their ability to provide service without access to entrance facilities at TELRIC rates: "entrance facilities are less costly to build, are more widely available from alternative providers, and have greater revenue potential than dedicated transport between [two] incumbent LEC central offices." *Id.* ¶ 138; *see id.* ¶ 141 & n.395. Competing LECs can "choose to locate their switches" in order to "minimiz[e] the length and cost of entrance facilities" and to "increas[e] the possibility of finding an alternative wholesale suppl[ier]." *Id.* ¶ 138.[12] In making those findings, the FCC did not distinguish between uses to which competitors put those facilities. *See id.*[13]

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[11] Order on Remand, *Unbundled Access to Network Elements; Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 20 FCC Rcd 2533 (2005) ("*Triennial Review Remand Order*" or "*TRRO*").

The FCC accordingly amended its regulations to state that incumbents need not provide unbundled access to entrance facilities. *See* 47 C.F.R. § 51.319(e)(2)(i). Although various parties sought review of the *Triennial Review Remand Order*, none challenged that rule.

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[12] Thus, as the FCC recognized, competitors can (and do) build their own entrance facilities or obtain them from suppliers other than incumbents; it is therefore incorrect to say categorically, as the government does (at 5), that entrance facilities "are owned by incumbent LECs."

[13] In two footnotes in the *Triennial Review Remand Order*, the word "backhaul" appears in parenthetical quotations. *TRRO* ¶¶ 138 n.389, 141 n.396. These references cannot be read to suggest that the FCC limited its impairment analysis to entrance facilities when used for backhaul. In fact, the analysis was not so limited, *see id.* ¶¶ 138-139, 141, no different from the *Local Competition Order* and *UNE Remand Order*, in which the FCC also assessed impairment with respect to both uses of entrance facilities. Moreover, a contrary reading of the order would mean that the FCC violated the D.C. Circuit's mandate in *USTA II*, *see* 359 F.3d at 586, by conducting an incomplete impairment analysis for entrance facilities.

B. Procedural History

1. Following the *Triennial Review Remand Order*, AT&T announced that it would cease fulfilling new orders for TELRIC-priced entrance facilities and would begin billing existing entrance facilities at rates in its state and federal tariffs.[14] Other incumbents did the same.

Competitors, however, asserted that incumbents were still required to provide entrance facilities at TELRIC rates, at least when competitors use those facilities to exchange traffic with incumbents. To support that assertion, competitors relied on paragraph 140 in the *Triennial Review Remand Order*:

> We note in addition that our finding of non-impairment with respect to entrance facilities does not alter the right of competitive LECs to obtain interconnection facilities pursuant to section 251(c)(2) for the transmission and routing of telephone exchange service and exchange access service. Thus, competitive LECs will have access to these facilities at cost-based [i.e., TELRIC]

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[14] Following the *Triennial Review Order*, AT&T had sought to amend its interconnection agreements with competitors nationwide to implement the FCC's rulings in that order, a process the FCC required and expected could take nine months. *See TRO* ¶¶ 700-706. However, before the end of that nine-month period, the D.C. Circuit issued its *USTA II* decision vacating and remanding the *Triennial Review Order* in significant part. The FCC responded by ordering incumbents to continue providing UNEs on terms in existing interconnection agreements while it completed its proceeding on remand from *USTA II*. *See* Order and Notice of Proposed Rulemaking, *Unbundled Access to Network Elements*, 19 FCC Rcd 16783, ¶¶ 1, 7 (2004) ("*TRRO NPRM*").

> rates to the extent that they require them to interconnect with the incumbent LEC's network.

TRRO ¶ 140 (footnote omitted).

State commissions considered those competing contentions in arbitrating amendments to AT&T's (and other incumbents') existing interconnection agreements with competitors.[15] A number of state commissions rejected competitors' attempts to preserve TELRIC-priced access to entrance facilities. For example, the Ohio commission found that § 251(c)(2) requires an incumbent to "interconnect its network with . . . facilities and equipment" that are "provided by the [competitor], not leased from the [incumbent]" at TELRIC rates.[16]

Other state commissions, including the Michigan commission, accepted the competitors' contentions. In the order challenged here, the Michigan commission concluded that the FCC, in paragraph 140 of the

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[15] In those proceedings, state commissions also considered competitors' claims that a separate provision of the 1996 Act, 47 U.S.C. § 271, required incumbents to continue leasing at TELRIC rates various other elements the FCC had held should not be provided as UNEs. Although some state commissions accepted that claim, all five courts of appeals to consider the question rejected those arguments. *See, e.g.*, *Qwest Corp. v. Arizona Corp. Comm'n*, 567 F.3d 1109, 1116 (9th Cir. 2009) (collecting cases); *Illinois Bell II*, 548 F.3d at 612-13 (Posner, J.); *Verizon New England Inc. v. Maine Pub. Utils. Comm'n*, 509 F.3d 1, 7-9 (Boudin, C.J.), *on denial of reh'g*, 509 F.3d 13 (1st Cir. 2007) (per curiam).

[16] Arbitration Award at 22-23, *Establishment of Terms and Conditions of an Interconnection Agreement Amendment Pursuant to the Federal Communications Commission's Triennial Review Order and its Order on Remand*, Case No. 05-887-TP-UNC, 2005 WL 3018712 (Ohio Pub. Utils. Comm'n Nov. 9, 2005), http://dis.puc.state.oh.us/TiffToPDf/LZAH5X8NU6JSB7R+.pdf.

Triennial Review Remand Order, made the "specific finding[]" that competitors "have a right to entrance facilities to the extent required for interconnection pursuant to Section 251(c)(2)." App. 185a. The Michigan commission therefore ordered that AT&T's interconnection agreements with competitors, including petitioner Talk America, be amended to require AT&T to provide entrance facilities at TELRIC rates to comply with § 251(c)(2). App. 185a, 232a.

On November 30, 2005, the Michigan commission approved an amendment to AT&T's interconnection agreement with Talk America, along with identical amendments to AT&T's interconnection agreements with more than 40 other competitors.[17] That amendment provided in relevant part as follows:

> Entrance facilities . . . In accordance with Paragraph 140 of the TRRO, nothing in this Section 1.1 nor the FCC's finding of non-impairment with respect to entrance facilities alters [Talk America]'s right to obtain interconnection facilities (entrance facilities or dedicated transport) pursuant to Section 251(c)(2) of the Act or to obtain access to such facilities at the same rates for dedicated transport as set forth in the [UNE] Pricing Schedule.[18]

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[17] Order at 3, *Joint Requests for Commission Approval of Interconnection Agreements and Amendments*, Case Nos. U-11340 et al. (MPSC Nov. 30, 2005), http://efile.mpsc.state.mi.us/efile/docs/13569/0012.pdf.

[18] Joint Application, Ex. A at 6, *Request for Commission Approval of An Interconnection Agreement between Talk America Inc. and Michigan Bell Telephone Company*, Case No. U-13569 (MPSC filed Nov. 7, 2005), http://efile.mpsc.state.mi.us/efile/docs/13569/0011.pdf.

2. AT&T challenged the Michigan commission's order in federal district court. The court ruled that it was "not reasonable" to interpret paragraph 140 of the *Triennial Review Remand Order* to require incumbent LECs to provide entrance facilities at TELRIC rates pursuant to § 251(c)(2). App. 158a. The court read the FCC's order to "convey[] [its] finding . . . that entrance facilities should be offered competitively," not at TELRIC rates. *Id.*

3. The Michigan commission and three competitors, including Talk America, appealed. The Sixth Circuit affirmed in a 2-1 decision.

The court of appeals agreed with the district court that paragraph 140 of the *Triennial Review Remand Order* could not be read to impose on incumbents the obligation to provide competitors with entrance facilities at TELRIC rates. Instead, the court found that the "most plausible" reading of paragraph 140 is that, "if [a competitor] build[s] [its] own entrance facility, the [incumbent] must still let [the competitor] hook [that entrance facility] up to [the incumbent's] network (i.e., use its 'interconnection facility') at wholesale rates." App. 17a-18a. The court accordingly held that a competitor that "chooses to use [an incumbent's] entrance facility" — rather than "build its own entrance facility," "rent someone else's," or "connect directly" to the incumbent's network without using an entrance facility — "must pay the rates determined by the [incumbent]" in its tariff, not TELRIC rates. App. 32a.

Thus, as the Sixth Circuit explained by way of an analogy to extension cords and electrical outlets, *see* App. 18a-21a, there is a critical difference between entrance facilities and the "interconnection facilities" that incumbents provide under § 251(c)(2) to accommodate interconnection with a competitor's facilities and equipment. The former span the entire physical distance between a competitor's switch and an incumbent's switch, which may "be very long," "even miles," if the competitor has elected to locate its switch far from the incumbent's. App. 3a. Interconnection facilities, in contrast, are the equipment *within* the incumbent's network (and in almost all cases within its central office buildings) to which the competitor's entrance facility attaches; that equipment can include, for example, a port on a frame connected to the incumbent's switch as well as a cross-connect cable attached to that frame. App. 19a-20a.[19]

The court of appeals rejected the Michigan commission's contrary reading of paragraph 140, holding that the interpretation "require[d] several assumptions, none of which is easily defended." App. 24a. In particular, the Michigan commission's interpretation presumed that the FCC had "used two separate terms" in paragraph 140 — "'entrance facility' and 'interconnection facility' — to describe the exact same wire, without any explanation why." *Id.* The Michigan commission's interpretation also was based on an "unnatural reading" of the "phrase 'provide . . . interconnection *with* the [incumbent]'s network'" in § 251(c)(2) that had "no support in the statute." App. 28a (quoting 47 U.S.C. § 251(c)(2)) (omission in original). The better reading of that statutory phrase, the court found, was that "the [incumbent] is obligated" to "'make a plug-in available' *for* connection with the [competitor]'s facilities and equipment," not "to 'lease a physical facility (or wire)' *to* the [competitor]." *Id.*

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[19] A port is a socket where a cable attaches to a switch. A cross-connect cable is used to connect two other wires together — *e.g.*, to connect a competitor's entrance facility to a wire in an incumbent's central office. A port and a cross-connect cable are rough equivalents of the "wall outlet" and "surge protector" in the Sixth Circuit's analogy. App. 21a.

The Sixth Circuit acknowledged that its holding conflicted with decisions of the Seventh and Eighth Circuits, which had held that, when the FCC referred in paragraph 140 of the *Triennial Review Remand Order* to the "right of competitive LECs to obtain *interconnection facilities* pursuant to section 251(c)(2)," the agency actually "said . . . that [incumbents] must allow use of *entrance facilities* for interconnection" at TELRIC rates. *Illinois Bell Tel. Co. v. Box*, 526 F.3d 1069, 1072 (7th Cir. 2008) ("*Illinois Bell I*") (emphases added); *see Southwestern Bell Tel., L.P. v. Missouri Pub. Serv. Comm'n*, 530 F.3d 676, 683-84 (8th Cir. 2008) (following *Illinois Bell I*), *cert. denied*, 129 S. Ct. 971 (2009). The court below did "not find th[o]se two cases persuasive," because their "'reasoning' is entirely circular" as each "assum[ed] the very question to be decided"—namely, that "interconnection facilities" and "entrance facilities" are the same thing. App. 28a-31a.

The Sixth Circuit also refused to defer to the position of the FCC in an *amicus* brief, finding that the FCC's position "is so plainly erroneous" that it could "only conclude that the FCC has attempted to create a new *de facto* regulation under the guise of interpreting the regulation." App. 9a-10a n.6. In that *amicus* brief, the FCC urged the Sixth Circuit to reverse the district court, asserting that the district court had improperly treated the "FCC's statement in paragraph 140" as "a mere 'explanatory comment' without legal force." App. 129a & n.32. But the FCC conceded in its brief that, when it stated in the *Triennial Review Remand Order* that it did "not alter the right of competitive LECs to obtain *interconnection* facilities pursuant to section 251(c)(2)." *TRRO* ¶ 140 (emphasis added), the FCC "did not specifically define what it meant by the term 'interconnection facilities.'" Gov't C.A. Br. 20 (App. 137a-138a).

The Michigan commission and the competitor appellants filed petitions for rehearing, which the Sixth Circuit denied. App. 90a-91a.

SUMMARY OF ARGUMENT

A. Section 251(c)(2) does not obligate incumbents to lease entrance facilities to competitors. The statutory text provides that an incumbent has the "duty to provide, for the facilities and equipment of any requesting telecommunications carrier, interconnection with the [incumbent's] network" at a "point within" the incumbent's network. 47 U.S.C. § 251(c)(2)(B). An incumbent's obligation under § 251(c)(2) is thus to enable competitors to connect *their own* facilities and equipment to the incumbent's network at an interconnection point. An incumbent is not required to lease to a competitor the transport facilities that the competitor will use to carry traffic from its network to the point within the incumbent's network at which interconnection occurs.

The 1996 Act's structure reinforces that conclusion. As this Court has recognized in multiple cases, § 251(c) imposes on incumbents multiple, distinct duties to assist competitors in entering the local telecommunications marketplace. Unlike § 251(c)(2), § 251(c)(3) explicitly imposes on incumbents an obligation to lease facilities to a competitor. The contrast between the statutory language addressing unbundling and interconnection confirms that § 251(c)(2) does not require incumbents to lease to competitors the transport facilities that competitors use to exchange traffic with incumbents.

The government concedes, and petitioners do not disagree, that "[t]he FCC's interconnection rules, which were adopted in 1996, do not expressly require incumbents to provide entrance facilities to satisfy their interconnection obligations under Section 251(c)(2)." Gov't Br. 22 n.6. Instead, those regulations confirm what the Act's text and structure demonstrate: § 251(c)(2) does not impose on incumbents an obligation to lease entrance facilities. By regulation, the FCC has defined "interconnection" to exclude "transport," 47 C.F.R. § 51.5, which further undermines the notion that § 251(c)(2)'s duty to "provide . . . interconnection" includes the duty to lease a transport facility, such as an entrance facility. The FCC's interconnection regulations also specify certain points within an incumbent's network at which interconnection occurs – notably, each of those points is within the incumbent's central office.

B. In defending the Michigan commission's mandate, petitioners rely on misinterpretations of a few isolated sentences in the FCC's *Triennial Review* orders, as well as the government's *amicus* briefs. That reliance is unavailing for three reasons.

First, there is no FCC interpretation of § 251(c)(2) that is eligible for deference under *Chevron*. The FCC statements on which petitioners and the government rely are, at most, informal statements of policy, not legislative rules; consequently, under this Court's decisions in *United States v. Mead Corp.*, 533 U.S. 218 (2001), and *Christensen v. Harris County*, 529 U.S. 576 (2000), no deference could be afforded to those statements (regardless of their proper interpretation).

Second, no deference to the government's views is warranted under *Auer*. Neither the FCC's orders nor the government's *amicus* briefs purport to interpret any specific FCC regulation to require entrance facilities under § 251(c)(2). Nor could the FCC have used an *amicus* brief to amend its interconnection regulations to impose such an obligation. The government's *amicus* briefs also cannot be treated as the FCC's fair and considered judgment on the issues in this case, because those two briefs offer shifting interpretations of the text of the *Triennial Review* orders.

Third, and in all events, the sentences in the FCC's orders on which petitioners and the government rely cannot be read to say that incumbents must provide entrance facilities under § 251(c)(2). Rather, those statements simply reiterate the FCC's long-held view that incumbents must accommodate interconnection with a competitor's facilities and equipment. That obligation to accommodate interconnection does not include a duty to lease a transport facility to a competitor.

C. Requiring incumbents such as AT&T to provide TELRIC-priced entrance facilities to competitors also conflicts with the 1996 Act's policy of encouraging facilities-based competition. Enabling competitors' continued dependence on non-bottleneck facilities leased from incumbents at artificially low prices discourages them from building or obtaining their own facilities. Neither petitioners nor their *amici* even attempt to explain why competitors need access to entrance facilities at TELRIC prices; nor could they, in light of the FCC's findings that competitors can — and do — build their own entrance facilities and obtain them from alternative providers.

ARGUMENT

AT&T IS NOT REQUIRED TO PROVIDE ENTRANCE FACILITIES TO COMPLY WITH § 251(c)(2)

A. The Sixth Circuit Correctly Held That Neither § 251(c)(2) nor the FCC's Implementing Rules or Orders Obligate Incumbents To Provide TELRIC-Priced Entrance Facilities to Competitors

1. Section 251(c)(2)'s text and the 1996 Act's structure demonstrate that § 251(c)(2) requires an incumbent to provide interconnection, not a transport facility spanning the distance between the incumbent's and competitors' switches. *See, e.g.*, *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 450 (2002) ("As in all statutory construction cases, we begin with the language of the statute.").

a. Section 251(c)(2) requires an incumbent to "provide, for the facilities and equipment of any requesting telecommunications carrier, interconnection with the [incumbent] local exchange carrier's network . . . at any technically feasible point within the [incumbent] carrier's network." 47 U.S.C. § 251(c)(2). Nothing in that text suggests that the incumbent's obligation to "provide . . . interconnection" includes the duty to lease a facility spanning the entire physical distance (miles, in some cases) between the competitor's network and its own. On the contrary, the only "facilities and equipment" to which the statute refers are those "*of* any requesting telecommunications carrier." *Id.* (emphasis added). The incumbent's duty is to "provide . . . interconnection" "*for*" the competitor's facilities and equipment at a "*point within*" the incumbent's network. *Id.* (emphases added).[20] Put differently, § 251(c)(2) obligates incumbents to enable competitors to connect their facilities and equipment to a point within the incumbent's network. It does not require the leasing of facilities to transport traffic from the competitor's network to that interconnection point.

This Court recognized the limited nature of the § 251(c)(2) duty in *Verizon*, in the course of rejecting a challenge to an FCC regulation that required an incumbent, "[u]pon request," "to combine unbundled network elements with elements possessed by the requesting telecommunications carrier." 47 C.F.R. § 51.315(d) (1997). As the Court understood the regulation, it required incumbents only "'to combine'" a "competitive carrier's element with the incumbent's network," such as by providing a cross-connect cable, and it applied only "when the entrant is unable to do the job itself." 535 U.S. at 532, 535 (quoting 47 C.F.R. § 51.315(d) (1997)); *see Local Competition Order* ¶¶ 294 & n.620, 386.

In upholding the regulation, the Court explained that the regulation "appears to be nothing more than an element-to-element version of the incumbents' statutory duty 'to provide, for the facilities and equipment of any requesting . . . carrier, interconnection with the local exchange carrier's network.'" 535 U.S. at 538 (quoting 47 U.S.C. § 251(c)(2)) (ellipsis added in *Verizon*). It found further that "it is hard to see how this rule is any less reasonable than § 251(c)(2), which imposes a statutory duty to interconnect." *Id.* The Court's description of § 251(c)(2) supports the natural reading of that provision's text, under which the interconnection duty is about attaching networks, not leasing a transport facility spanning the potentially miles-long space between two carriers' networks.

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[20] Neither petitioners nor the government address these aspects of § 251(c)(2)'s text. The California Public Utilities Commission ("CPUC") argues (at 13-15) that, to provide "interconnection" for a competitor's facilities at a point within its network, an incumbent must provide a transport facility extending (potentially) many miles from the interconnection point to a point within the competitor's network. Petitioners and the government rightly do not advance that absurd reading of the text.

b. The structure of the 1996 Act further reinforces the conclusion that § 251(c)(2) does not require incumbents to provide the transport facilities that link competitors' switches to the point of interconnection within the incumbent's network. The 1996 Act sets up three different methods for new entry by competitors: interconnection under § 251(c)(2), unbundling under § 251(c)(3), and resale under § 251(c)(4). *See supra* pp. 3-4. This Court's cases have recognized the structural differences among those provisions, with § 251(c)(3) being the only provision that requires incumbents to lease facilities to competitors and § 251(c)(2) being limited to providing interconnection for *the competitor's* facilities.

As the Court explained in *Verizon*, when a competitor "decide[s] to engage in pure facilities-based competition," § 251(c)(2) "obligates the incumbent to 'interconnect' the competitor's facilities to its own network," whereas § 251(c)(4) sits "[a]t the other end of the spectrum" and permits competitors "to skip construction" entirely and instead "simply . . . resell" the incumbent's service. 535 U.S. at 491. Section 251(c)(3) lies "[b]etween these extremes"; it allows a competitor "to lease certain of an incumbent's 'network elements.'" *Id.* at 491-92. The Court described the same three-part structure in *Iowa Utilities Board*:

> [A] requesting carrier can obtain access to an incumbent's network in three ways: It can purchase local telephone services at wholesale rates for resale to end users; it can lease elements of the incumbent's network "on an unbundled basis"; and it can interconnect *its own facilities* with the incumbent's network.

525 U.S. at 371 (emphasis added).

Like the Court, the government's briefs in *Verizon* and *Iowa Utilities Board* articulated the same distinction between paragraphs (c)(2) and (c)(3). *But cf.* Gov't Br. 2 (asserting here that § 251(c) creates "overlapping" duties). In *Verizon*, the government distinguished § 251(c)(3), which "entitles a new entrant to gain 'access' to . . . an incumbent's 'network elements,'" from § 251(c)(2), which "permits new entrants to 'interconnect' *their own facilities* with those in the incumbent's network." U.S. Br. 3-4, *Verizon* (emphasis added). In *Iowa Utilities Board*, the government similarly described § 251(c)(2) as "requir[ing] incumbent LECs to 'interconnect' their networks with those of other carriers," whereas § 251(c)(3) "permits new entrants . . . to lease from incumbents whatever combinations of elements they need . . . to provide telecommunications services to their customers." U.S. Br. 5-6, *Iowa Utils. Bd.* There, the government also emphasized the "*marked contrast*" between § 251(c)(2) and (c)(3) and observed that paragraph (c)(2) "obligates incumbents to 'interconnect' with 'the facilities and equipment' of other carriers, language that does not appear in Section 251(c)(3)." U.S. Reply Br. 27, *Iowa Utils. Bd.* (emphasis added).

Thus, as this Court and the government (in prior cases) have made clear, only § 251(c)(3), and not

§ 251(c)(2) or (c)(4), requires incumbents to provide a competitor with "access to network elements." The contrast between § 251(c)(3), which expressly imposes an obligation to lease facilities, and § 251(c)(2), which requires only "interconnection" "for" *the competitor's facilities* at a "point within" the incumbent's network, reinforces the conclusion that § 251(c)(2) does not obligate incumbents to lease entrance facilities to competitors at TELRIC rates. Section 251(c)(2)(D), which states that the required interconnection shall be provided at rates and on terms "in accordance with . . . the requirements of this section," further bolsters the conclusion that only § 251(c)(3) creates a facilities-leasing obligation: reading § 251(c)(2) to require leasing of facilities not required by § 251(c)(3) would not be "in accordance with" the requirements of § 251.

Section 252(d)(1), which contains the pricing standard for both the interconnection duty in § 251(c)(2) and the unbundling duty in § 251(c)(3), confirms that only the latter imposes a duty to lease facilities. With respect to the unbundling duty, § 252(d)(1) governs the "rate for [the] network elements" that incumbents must lease to competitors. 47 U.S.C. § 252(d)(1). In contrast, with respect to the interconnection duty, § 252(d)(1) applies to the "rate for the interconnection *of* facilities and equipment." *Id.* (emphasis added). If Congress had meant for § 251(c)(2) to require incumbents to lease facilities and equipment to other carriers, as § 251(c)(3) requires, it would instead have established a pricing standard "for the facilities and equipment used for interconnection," just as it established one "for the network elements" that must be unbundled. Here, again, the different language Congress used confirms that the interconnection obligation does not include a requirement to lease entrance facilities.

Finally, § 251(a)(1), which imposes an interconnection duty on all telecommunications carriers, also supports AT&T's interpretation of § 251(c)(2). Section 251(a)(1) requires all carriers "to interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers." *Id.* § 251(a)(1). The two interconnection provisions thus contain parallel language: both require interconnection with "the facilities and equipment" of another carrier, and, as construed by the FCC, "interconnect" under § 251(a)(1) has the same meaning as "interconnection" under § 251(c)(2).[21] Unlike § 251(c)(2), however, § 251(a)(1) can be satisfied through "indirect[ ]" interconnection, *see Local Competition Order* ¶ 997 — that is, an interconnection arrangement in which two carriers' networks are both connected to the network of a third carrier, but not to each other's. It is thus plain that the interconnection duty under § 251(a)(1) does not include a requirement to lease facilities, and there is no language in § 251(c)(2) that would distinguish it from § 251(a)(1) in that regard.

2. In its regulations implementing § 251(c)(2), the FCC has never attempted to impose an obligation on incumbents to lease entrance facilities to competitors at TELRIC rates, a point the government correctly concedes (at 22 n.6). On the contrary, the FCC's interconnection regulations confirm what the Act's text and structure demonstrate: § 251(c)(2) does not impose on incumbents an obligation to lease entrance facilities.

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[21] *See* Memorandum Opinion and Order, *Total Telecomms Servs., Inc. v. AT&T Corp.*, 16 FCC Rcd 5726, ¶ 25 (2001) ("We find nothing in the statutory scheme to suggest that the term 'interconnection' has one meaning in section 251(a) and a different meaning in section 251(c)(2)."). On review, the D.C. Circuit upheld the FCC's conclusion on that point. *See AT&T Corp. v. FCC*, 317 F.3d 227, 234-35 (D.C. Cir. 2003).

a. In its first order implementing the Act, the 1996 *Local Competition Order*, the FCC defined "interconnection" under § 251(c)(2) as "the linking of two networks for the mutual exchange of traffic." 11 FCC Rcd at 16199 (promulgating 47 C.F.R. § 51.5). Relying on the 1996 Act's structure, the FCC specifically excluded from that definition "the *transport* and termination of traffic," precisely because it is addressed in a different statutory provision. *Id.* (emphasis added); *id.* ¶ 176.

In defending the FCC's definition of interconnection in the court of appeals, the government argued that its definition of interconnection ensures that paragraphs (c)(2) and (c)(3) serve independent purposes. As the government explained, "[i]f section 251(c)(2) interconnection included routing and transmission, section 251(c)(2) would overlap with other subsections that describe a duty to route and transmit or *a duty to lease facilities that will be used for routing and transmission*. . . . See especially subsections 251(b)(5) and *251(c)(3)*." U.S. Br. 13 & n.17, *Competitive Telecomms. Ass'n v. FCC*, 117 F.3d 1068 (8th Cir. 1997) ("U.S. CompTel Br.") (emphases added), *available at* http://www.khhte.com/public/US_CompTel_Br.pdf.[22] The FCC had similarly explained in the *Local Competition Order* that it is paragraph (c)(3), not (c)(2), that allows competitors "to substitute incumbent LEC facilities for some or all of the facilities the new entrant would have had to obtain in order to compete," which include (among others) entrance facilities. *Local Competition Order* ¶ 172.

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[22] The FCC later explained to the D.C. Circuit that its exclusion of transport from the definition of interconnection is "without qualification" and is not limited to the "compensation" due for individual calls under § 251(b)(5). U.S. Br. 34, *AT&T Corp. v. FCC*

Neither petitioners nor the government explain how § 251(c)(2)'s duty to "provide . . . interconnection" could include a requirement to furnish a transport facility spanning the distance between two networks, when "interconnection" expressly excludes "transport." 47 C.F.R. § 51.5. The government acknowledges the exclusion only in passing, while suggesting (at 3 n.1) that competitors pay incumbents, under § 251(b)(5), for their use of entrance facilities when sending calls to the incumbents' customers. Not so. The FCC's rules implementing the reciprocal compensation duty in § 251(b)(5) require payment only "from the interconnection point" to the point of "delivery" to the called party. 47 C.F.R. § 51.701(c)-(d). The entrance facility runs between the competitor's switch serving the calling party and the point of interconnection on the incumbent's network; therefore, a competitor's payments under § 251(b)(5) do not cover its use of the entrance facility.

The Michigan commission concedes (at 28 n.13) that "[e]ntrance facilities are a 'type' of dedicated transport," but attempts to reconcile its concession with § 51.5 by asserting (at 26 n.12 & 28 n.13) that entrance facilities are "transmission facilities" (not transport) when used to exchange traffic with the incumbent. Nothing in § 51.5 suggests that "transmission facilities" are distinct from "transport"; in fact, as shown above, the FCC defended its definition of interconnection on the ground that it is § 251(c)(3), not § 251(c)(2), that imposes "a duty to lease facilities that will be used for . . . transmission." U.S. Comp-

Tel Br. 13; *see Local Competition Order* ¶ 439 (using the terms interchangeably). For its part, Talk America simply ignores the FCC's exclusion of "transport" from its definition of "interconnection."

b. The interconnection regulations promulgated in the *Local Competition Order* identified certain "point[s] within" the incumbent's network at which interconnection would occur. 47 U.S.C. § 251(c)(2). Those points include ports on switches and cross-connect cables in incumbents' central offices. *See Local Competition Order* ¶¶ 209-212; 47 C.F.R. § 51.305(a)(2). Although the FCC's list is not exclusive, all of the points of interconnection it identified are notably *inside* incumbents' central offices. *See* 47 C.F.R. § 51.305(a)(2).

The FCC also specified certain things that incumbents must do to accommodate interconnection at those points. Because incumbents' networks "were not designed to accommodate third-party interconnection . . . at all or even most points within the network," the FCC required incumbents, "at least to some extent, to adapt their facilities to interconnection." *Local Competition Order* ¶ 202; *see id.* ¶ 198 (FCC requires "modifications to incumbent LEC facilities to the extent necessary to accommodate interconnection"). But the agency nowhere suggested that the incumbents' obligation "to *adapt* their facilities" to enable interconnection included an obligation to *lease* to competitors transport facilities spanning the distance between networks.

Consistent with the FCC's order, AT&T does a number of things within its central offices (at TELRIC prices) — such as providing cross-connect cables, conduits, riser space, and ports — to accommodate the interconnection of competitors' entrance facilities.[23] AT&T thus does not argue that the § 251(c)(2) obligation is a purely "passive" duty; nor did the Sixth Circuit so hold. *See* App. 19a.

c. In the *Local Competition Order*, the FCC also concluded that § 251(c)(6), which permits a competitor to "collocat[e]" (or install) its equipment in an incumbent's central office, did not identify the only method of interconnection that incumbents must provide. *See Local Competition Order* ¶¶ 550-551. The FCC promulgated a regulation requiring incumbents to provide "any technically feasible method of obtaining interconnection." 47 C.F.R. § 51.321(a). Other than the statutory collocation duty, however, the FCC identified only one technically feasible method of interconnection: "[m]eet point interconnection arrangements." *Id.* § 51.321(b)(2). The FCC's treatment of meet-point arrangements is instructive in three respects.

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[23] *See* AT&T California Br. 35; *Pacific Bell Tel. Co. v. California Pub. Utils. Comm'n*, 621 F.3d 836 (9th Cir. 2010) (figure depicting steps AT&T undertakes within its central offices to comply with § 251(c)(2) to interconnect its network with a competitor-provided entrance facility). In contrast, the diagram in the Michigan commission's brief (at 23), which it copied from the CPUC's Ninth Circuit brief in *Pacific Bell* (*see* CPUC Br. 5 & App. 1), has numerous flaws. Among them, it shows separate cables used for backhauling and exchanging traffic, when (as Sprint concedes (at 9)) circuits performing each task can ride a single fiber-optic cable; the diagram also depicts the entrance facilities as covering a relatively short distance, when in fact the competitor may elect to locate its switch miles from the incumbent central office containing its chosen point of interconnection. No one rebuts the deficiencies AT&T identified in the diagram the Ninth Circuit created. *See Pacific Bell Tel. Co. v. California Pub. Utils. Comm'n*, 621 F.3d 836, 842 (9th Cir. 2010), *petition for cert. pending*, No. 10-838 (filed Dec. 23, 2010), Br. in Opp. 2 n.4.

First, "[i]n a meet point arrangement each party pays its portion of the costs to build out the facilities to the meet point." *Local Competition Order* ¶ 553. Thus, the competitor must provide its own facilities — and bear the cost of those facilities — to reach the meet point. *See id.* Nothing in the FCC's treatment of meet-point arrangements suggests that § 251(c)(2) allows competitors to insist that incumbents lease to them, at TELRIC rates, the transport facility between the competitor's switch and the meet point. But that is exactly what follows from petitioners' theory, because competitors use that transport facility "for the purpose of exchanging traffic with incumbent LECs." *Id.*

Second, the FCC made clear that the incumbent's obligation to engage in "some build out of facilities," if necessary to facilitate a meet-point arrangement, is "limited" to a "reasonable accommodation of interconnection." *Id.* Although the FCC left it to state commissions to determine the maximum "distance from an incumbent LEC's premises that an incumbent should be required to build out facilities," it never indicated that the incumbent might be required to build the entire facility extending between the two carriers' networks. *Id.* The FCC's Wireline Competition Bureau later rejected a competitor's effort to require an incumbent to "build[] new facilities all the way to [the competitor's] central office."[24]

Third, the FCC also held that, in a meet-point arrangement, the "'point' of interconnection for purposes of section[] 251(c)(2)" would not be at the meet point outside the central office (where the two carriers' facilities actually connect), but instead would remain inside the incumbent's central office, "*e.g.*, [on its] main distribution frame, [or the] trunk-side of the switch." *Local Competition Order* ¶ 553. The FCC thus recognized the conflict between its decision to require incumbents to provide even these "limited" facilities outside their central offices and the text of § 251(c)(2), which requires that the point of interconnection remain "within" the incumbent's local network.[25]

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[24] Memorandum Opinion and Order, *Petition of WorldCom, Inc. Pursuant to Section 252(e)(5) of the Communications Act for Preemption of the Jurisdiction of the Virginia State Corp. Comm'n Regarding Interconnection Disputes with Verizon Virginia Inc., and for Expedited Arbitration*, 17 FCC Rcd 27039, ¶ 134 (Chief, Wireline Comp. Bur. 2002) ("FCC Staff Order").

B. Petitioners' Reliance on the *Triennial Review* Orders and the Government's *Amicus* Briefs Is Misplaced

The government's *amicus* briefs, which purport to interpret a few sentences in the *Triennial Review* orders, cannot bear the essentially dispositive weight that petitioners place on them. On the contrary, the government's position is erroneous, and entitled to no deference, for three reasons.

First, no deference is warranted under *Chevron* because none of the FCC statements on which petitioners and the government rely satisfies the standard of formality prescribed in *Mead* and *Christensen*. Second, no deference is warranted under *Auer* because neither the FCC's orders nor the government's *amicus* briefs purport to interpret any specific FCC regulation to require entrance facilities under § 251(c)(2); nor could the FCC have used an interpretive rule (or *amicus* brief) to add such an obligation to its interconnection regulations. Third, and in all events, the sentences in the FCC's orders on which petitioners and the government rely cannot be read to say that incumbents must provide entrance facilities under § 251(c)(2). Instead, the only permissible reading of those statements is that they reaffirm that incumbents must engage in the same limited network modifications, to accommodate interconnection with a competitor's facilities and equipment, that the FCC had long interpreted § 251(c)(2) to require.

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[25] The lawfulness of the FCC's meet-point rule was not tested in the courts of appeals.

1. *Chevron* deference is not warranted

Petitioners and the government principally seek to ground the supposed obligation to provide TELRIC-priced entrance facilities under § 251(c)(2) on a few sentences in the FCC's *Triennial Review* orders.[26] They rely on the FCC's statement in the *Triennial Review Order* that, "to the extent that requesting carriers need facilities in order to 'interconnect[] with the [incumbent's] network,' section 251(c)(2) of the Act expressly provides for this and we do not alter the Commission's interpretation of this obligation." *TRO* ¶ 366 (first alteration in original). They also rely on a two-sentence paragraph from the *Triennial Review Remand Order* in which the FCC stated that its "finding of non-impairment with respect to entrance facilities does not alter the right of competitive LECs to obtain interconnection facilities pursuant to section 251(c)(2)" and that competitors "will have access to these facilities at cost-based rates to the extent that they require them to interconnect with the incumbent LEC's network." *TRRO* ¶ 140.

To the extent those sentences are read as interpreting § 251(c)(2) — despite the FCC's express assurances that it was "not alter[ing]" its interpretation of that section — they are not eligible for *Chevron* deference. In determining whether an agency's statutory interpretation is eligible for deference under *Chevron*, this Court evaluates the circumstances surrounding the issuance of the statement to determine whether Congress would have intended for such a statement to carry the force of law. *See Mead*, 533 U.S. at 229-31. Although not dispositive, *see id.* at 230-31, the paradigmatic example of agency action "meriting *Chevron* treatment" is a "process of rulemaking . . . that produces regulations," *id.* at 229. On the other end of the continuum, when an agency acts through less formal means, such as "opinion letters," "policy statements, agency manuals, and enforcement guidelines," it cannot claim "*Chevron*-style deference." *Christensen*, 529 U.S. at 587; *see Mead*, 533 U.S. at 231-34 (tariff classification rulings by the Customs Service, though authorized by statute, "are beyond the *Chevron* pale").

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[26] *See* App. 185a; MPSC Br. 11-13; Talk Am. Br. 25-27; Gov't Br. 16, 22 n.6.

Here, although the government makes the sweeping claim (at 31) that *everything* in the *Triennial Review* orders is a "legislative act[]," the specific FCC statements on which petitioners and the government rely lack the necessary formality under *Mead* and *Christensen*. Indeed, the FCC did not even purport to exercise its rulemaking authority with respect to those statements. The notices of proposed rulemaking that preceded the *Triennial Review* orders did not even cite § 251(c)(2), let alone give any indication that the agency was contemplating promulgating binding rules implementing that provision.[27] Nor did the orders promulgate any new interconnection regulation or amend any existing interconnection regulations (with one exception not relevant here[28]). *See TRO*, 18 FCC Rcd at 17469-503 (appendix reproducing regulations promulgated in the *TRO*); *TRRO*, 20 FCC Rcd at 2677-84 (same, *TRRO*).

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[27] *See* Notice of Proposed Rulemaking, *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 16 FCC Rcd 22781 (2001); *TRRO NPRM*.

The orders themselves contain nothing putting parties on notice that the FCC had announced a new legal obligation that could or should have been challenged on judicial review. On the contrary, in the sentences on which petitioners and the government rely, the agency expressly reassured parties that it did "not alter" its prior interpretation of § 251(c)(2). *TRO* ¶ 366; *TRRO* ¶ 140.[29] The orders also make no effort to reconcile a requirement to provide TELRIC-priced entrance facilities under § 251(c)(2) with the text, structure, or policy of the Act. *See id.* Nor did the Commission attempt to square such an obligation with its regulation defining "interconnection" to exclude "the transport . . . of traffic," 47 C.F.R. § 51.5, along with any "duty to lease facilities that will be used for routing and transmission" of traffic between networks, U.S. CompTel Br. 13; *see supra* p. 26.

It also does not help — and in fact hurts — the government's case to point out, as it does (at 31), that a summary of the *Triennial Review Remand Order* was published in the Federal Register. Such a summary was also published for the *Triennial Review Order*. Neither summary mentioned § 251(c)(2). To make matters worse for the government, both summaries referred to the orders' determinations that entrance facilities would no longer be available under § 251(c)(3) *without mentioning* the qualifying language that the government now claims created a legal obligation to provide those facilities under § 251(c)(2). *See* 70 Fed. Reg. 8940, 8941 (Feb. 24, 2005); 68 Fed. Reg. 52,276, 52,280 (Sept. 2, 2003); *see also* 5 U.S.C. § 552(a)(1)(D)-(E) (requiring Federal Register publication of "substantive rules" and "amendment[s]" thereto).

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[28] In response to *Iowa Utilities Board v. FCC*, 120 F.3d 753, 812 (8th Cir. 1997), the FCC in the *Triennial Review Order* amended 47 C.F.R. § 51.305 to remove a paragraph requiring incumbents to provide interconnection that "is superior in quality" to what the incumbent provides to itself (47 C.F.R. § 51.305(a)(4) (2003)). *See TRO* ¶¶ 15, 630, 633 n.1917, App. B.

[29] For that reason, the government rightly does not defend the Ninth Circuit's assertion that incumbents such as AT&T had to seek judicial review of the supposed conclusion in the *Triennial Review Order* that TELRIC-priced entrance facilities must be provided under § 251(c)(2). *See Pacific Bell*, 621 F.3d at 847.

Considering all of those deficiencies, "[i]t is difficult, in fact, to see in the agency practice itself any indication that [the FCC] ever set out with a lawmaking pretense in mind when it" made the remarks on which petitioners and the government rely. *Mead*, 533 U.S. at 233. Certainly, there is no reason to believe that Congress would have intended for the FCC to issue "rulings with the force of law" (*id.* at 231-32) in the manner in which it proceeded here.

To be sure, the FCC can issue an interpretation in a rulemaking order that is entitled to *Chevron* deference, even if not codified in the Code of Federal Regulations. *Cf. National Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 980-81 (2005). But where, as here, the agency in an order *affirmatively disclaims* any intention to alter its existing interpretation of a statute, it cannot assert — in an *amicus* brief years after the fact — that it actually promulgated a new legislative rule interpreting the statute. *Cf. Long Island Care at Home,* *Ltd. v. Coke*, 551 U.S. 158, 170-71 (2007) (when an agency's interpretation creates "unfair surprise," its claim for deference is weakened).

2. *Auer* deference is not warranted

Under this Court's decision in *Auer*, an agency's "interpretation" of its "own regulation[]" is not entitled to deference if the interpretation is "inconsistent with the regulation" or "does not reflect the agency's fair and considered judgment on the matter in question." 519 U.S. at 461-62 (internal quotation marks omitted).

a. Here, the threshold predicate for *Auer* deference — an agency interpretation of a regulation — is lacking. In neither the passages from the *Triennial Review* orders on which petitioners and the government rely nor the government's *amicus* briefs in this case has the FCC ever attempted to interpret a specific Commission interconnection regulation to require incumbents to provide entrance facilities. Indeed, the pertinent passages of the *Triennial Review* orders do not even cite any of the FCC's interconnection regulations, let alone purport to interpret any of them. *See TRO* ¶ 366; *TRRO* ¶ 140. This case is thus fundamentally different from cases in which this Court has considered whether to give deference to an agency's construction of specific ambiguous language in one of its regulations. *See, e.g., Chase Bank USA, N.A. v. McCoy*, 131 S. Ct. 871, 880-81 & n.8 (2011) (deferring to agency's interpretation of the ambiguous phrase "[c]hange in terms" in Regulation Z, where the agency advanced a "consistent" interpretation of that phrase in *amicus* briefs before the court of appeals and this Court).[30]

b. Even if the FCC had purported in the *Triennial Review* orders or its *amicus* briefs to interpret 47 C.F.R. § 51.321(a), which requires incumbents to provide "any technically feasible method of obtaining interconnection . . . at a particular point," its interpretation would not be entitled to *Auer* deference. As the government concedes (at 22 n.6), neither this rule (nor any other) "expressly require[s] incumbents to provide entrance facilities to satisfy their interconnection obligations under Section 251(c)(2)."[31] Instead, the FCC has specified only two required "methods of obtaining interconnection": (i) "collocation" of equipment inside the incumbent's central offices, and (ii) meet-point arrangements. 47 C.F.R. § 51.321(b).

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[30] The term "interconnection facility" appears only once in the FCC's regulations implementing § 251(c)(2). *See* 47 C.F.R. § 51.305(a)(3) ("requir[ing] an incumbent LEC to design interconnection facilities to meet the same technical criteria and service standards that are used within the incumbent LEC's network"). The government does not rely on this regulation, though Talk America (at 5) cites it in passing. The rule, by its terms, does not require leasing of facilities.

[31] The Michigan commission (at 31) and Talk America (at 13-14, 33), though not the government, cite 47 C.F.R. § 51.305(f), which requires incumbents to "provide two-way trunking upon request." A "trunk" is a circuit, which rides on a transport facility. *See id.*, pt. 36, App. A. The Commission promulgated this rule out of concern that a competitor might not have "a sufficient amount of traffic to justify separate one-way trunks" and required the incumbent to "accommodate two-way trunking" for such a competitor — that is, to configure its network so that traffic may be sent and received over a competitor's single trunk. *Local Competition Order* ¶ 219. Section 51.305(f) thus does not require the incumbent to lease facilities to a competitor.

The FCC cannot add to this list except by amending the regulation. As this Court has recognized and the court below explained, deference to an agency is unwarranted when the agency seeks, "under the guise of interpreting a regulation, to create *de facto* a new regulation." *Christensen*, 529 U.S. at 588; *see* App. 10a n.6. Any other result would permit an agency to make an end run around the notice-and-comment rulemaking process. *See United States v. Hoyts Cinemas Corp.*, 380 F.3d 558, 569 (1st Cir. 2004) (Boudin, C.J.) ("[W]here, as here, the [agency's] interpretation has the practical effect of altering the regulation, a formal amendment – almost certainly prospective and after notice and comment — is the proper course.").

Thus, courts have rejected agency efforts to impose new mandates under the guise of "interpreting" open-ended regulatory language. *See Mission Group Kansas, Inc. v. Riley*, 146 F.3d 775, 781-83 (10th Cir. 1998) (rejecting Secretary of Education's attempt to impose a new requirement for eligibility for funding based on regulations providing that recipients must meet "any additional conditions"); *United States v. Picciotto*, 875 F.2d 345, 348 (D.C. Cir. 1989) (rejecting Park Service effort to impose restrictions on a demonstrator pursuant to a Park Service regulation that listed certain restrictions and purported to authorize the Service to impose "additional reasonable conditions"); *Director, OWCP v. Mangifest*, 826 F.2d 1318, 1324-25 (3d Cir. 1987) (Becker, J.); 1 Richard J. Pierce, Jr., *Administrative Law Treatise* § 6.4, at 452 (5th ed. 2010).

Moreover, contrary to the government's assertion (at 24-25), the incumbent's obligation to participate in meet-point arrangements is qualitatively different from the facilities-leasing obligation the Michigan commission imposed.[32] In a meet-point arrangement, the competitor "pays its portion of the costs to build out the facilities to the meet point." *Local Competition Order* ¶ 553. The competitor thus has the incentive to "locate [its] switch[] close to the incumbent LEC's central office, minimizing the length and cost" of its portion of the meet-point facility. *TRRO* ¶ 138. And the incumbent's obligation to provide facilities to the meet point is "limited" to that "required [for a] reasonable accommodation of interconnection." *Local Competition Order* ¶ 553. In contrast, the Michigan commission's order shifts to the incumbent all of the actual costs of establishing the entrance facility, while virtually eliminating the competitor's incentive to minimize those costs: under TELRIC, the competitor pays only the "hypothetical" cost of a "most efficient" entrance facility, "untethered to" the cost of the "actual network element" the incumbent must provide. *Verizon*, 535 U.S. at 501. The obligation the Michigan commission imposed, therefore, is anything but "limited" and "reasonable." *Local Competition Order* ¶ 553. Indeed, in Talk America's view (at 29), it is "absolute."

c. A final impediment to granting *Auer* deference is that the government's *amicus* brief in this Court cannot be said to "reflect the [FCC]'s fair and considered judgment on" the interpretation of the *Triennial Review* orders. *Auer*, 519 U.S. at 462. In this Court, the government asserts (at 22 n.6) that *both* the

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[32] As the government concedes (at 25 n.7), the FCC's staff rejected a competitor's attempt to use the meet-point obligation to require an incumbent to provide a transport facility spanning the entire physical distance between an incumbent's and a competitor's network. *See also supra* p. 30 & n.24.

Triennial Review Order and the *Triennial Review Remand Order* "clarif[ied] . . . that Section 251(c)(2) gives competitive LECs a right of access to [entrance] facilities for interconnection" at TELRIC rates. And it claims (at 18) that "entrance facilities are 'interconnection facilities,' as that term is used in the *Triennial Review Remand Order*."

But the government made no such claims in its brief in the Sixth Circuit. On the contrary, it discussed the *Triennial Review Order* only in passing and did not contend that this order adopted a rule requiring incumbents to provide entrance facilities. *See* Gov't C.A. Br. 17, 19 (App. 134a, 137a). The FCC also conceded that it "did not specifically define what it meant by the term 'interconnection facilities'" in paragraph 140 of the *Triennial Review Remand Order*. *Id.* at 20 (App. 138a).

The government offers no explanation for why it discovered only in preparing its brief in this Court that the references to "facilities" in the *Triennial Review Order* and "interconnection facilities" in the *Triennial Review Remand Order* in fact meant "entrance facilities." That unexplained inconsistency precludes treating the government's current assertions as the agency's "fair and considered judgment" and validates the court of appeals' refusal to defer to the government's unpersuasive *amicus* brief in that court. *Cf. Chase Bank*, 131 S. Ct. at 881 n.8 (noting that agency's brief in this Court was "consistent with" its brief in the court of appeals).[33]

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[33] There also is no indication that the full Commission, which is a multi-member body, approved the contents of the government's *amicus* brief in this Court or in the court of appeals. The briefs presumably reflect, at most, the views of the FCC Chairman and his staff. *Cf. Sprint Nextel Corp. v. FCC*, 508 F.3d

3. Petitioners and the government erroneously interpret the *Triennial Review* orders

In all events, irrespective of whether this Court applies a deferential standard, the few sentences in the *Triennial Review* orders on which petitioners and the government rely cannot be read to say that incumbents must provide entrance facilities under § 251(c)(2).

First, as discussed above, the FCC explicitly stated in both orders that it did "not alter" its prior interpretation of § 251(c)(2). *TRO* ¶ 366; *TRRO* ¶ 140. Nor did the FCC mention § 251(c)(2) in its notices of proposed rulemaking or its summaries of those orders in the Federal Register. *See supra* pp. 33-35. And the government concedes (at 22 n.6) that, before the *Triennial Review Order*, the FCC had never interpreted § 251(c)(2) to impose an obligation to provide TELRIC-priced entrance facilities under § 251(c)(2). These facts fatally undermine the government's effort to read the statements in the *Triennial Review* orders as having for the first time interpreted § 251(c)(2) to require entrance facilities.

The government seeks (at 22 n.6) to explain away the absence of any pre-2003 rule or order requiring entrance facilities under § 251(c)(2) by claiming that the question whether competitors could obtain entrance facilities under that provision was not salient while the FCC required unbundling of entrance facilities under § 251(c)(3). But that does not explain why no competitor even *argued* the point before

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1129, 1132 (D.C. Cir. 2007) (agreeing with the FCC that, because "[t]he Commission . . . acts by majority vote," "the Commissioners' individual statements . . . are not institutional Commission actions"). That further undermines the government's deference claim.

then if, as petitioners now claim, § 251(c)(2) provided a straightforward way to obtain TELRIC-priced entrance facilities without regard to the statutory impairment standard — a subject of "an ongoing, decade-long dispute." *Covad Communications Co. v. FCC*, 450 F.3d 528, 532-33 (D.C. Cir. 2006). Regardless, the important and controlling point is that, in both *Triennial Review* orders, the FCC denied articulating a new interpretation of § 251(c)(2), and it admittedly had never previously interpreted § 251(c)(2) to require entrance facilities.

Second, neither order actually states that incumbents must provide "*entrance* facilities" under § 251(c)(2). Instead, those orders refer to "facilities" (*TRO* ¶ 366) or "interconnection facilities" (*TRRO* ¶ 140). Neither petitioners nor the government offer a plausible explanation for why the FCC did not say "entrance facilities," a phrase it used repeatedly in the same passages in each order, if that is what it in fact meant. *See* App. 24a.[34] Indeed, it was not until the government's *amicus* brief in this Court that the government first asserted (at 16) that the *Triennial Review* orders "use the term 'interconnection facility' to refer to an entrance facility that is being used for interconnection." *Compare* Gov't C.A. Br. 20 (App. 138a) (FCC's concession that it "did not specifically define what it meant by the term 'interconnection facilities'").[35]

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[34] Talk America (at 36), though not the government, cites a statement in a 2002 FCC staff order that certain "'entrance facilities' are interconnection facilities." FCC Staff Order ¶ 58. The staff there was discussing facilities that a competitor proposed to sell to an incumbent, *see id.*, which the staff recognized § 251(c)(2) does not cover, *see id.* ¶ 71 n.200. When the staff addressed the entrance facilities it required the incumbent to provide to competitors, the staff grounded its analysis entirely in § 251(c)(3) and the FCC's since-rescinded unbundling rule, without describing those entrance facilities as "interconnection facilities" or relying on either § 251(c)(2) or the FCC's interconnection regulations. *See id.* ¶¶ 210-217.

The references in the FCC's orders to "facilities" and "interconnection facilities" are instead naturally read to refer to the facilities (*e.g.*, cross-connect cables and ports) that the FCC had long required incumbents to provide as "accommodations" to facilitate interconnection at a point within the incumbent's network. *See supra* pp. 28-29; *see also* App. 19a-21a. Thus, the meaning of the FCC's qualifications in each order is plain, as the court of appeals recognized: the Commission intended to reassure competitors that incumbents were still obligated to assist competitors in attaching competitors' self-provided entrance facilities to a point within the incumbents' network. *See* App. 21a.[36]

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[35] The Michigan commission's suggestion (at 12 & n.7, 36) which the government does not endorse — that "these facilities" in the second sentence of paragraph 140 should be read to mean "entrance facilities" is flawed. The phrase plainly refers back to "interconnection facilities," the immediately preceding referent. *See Webster's New International Dictionary* 2624 (2d ed. 1952) ("these" is the plural of "this"); *id.* at 2629 (when used as an adjective, "this" means "[t]hat is present, near, or *just referred to*, in time or place") (emphasis added); R.W. Burchfield, *Fowler's Modern English Usage* 780 (rev. 3d ed. 2000) (when used as an adjective, "this" "is used to indicate a thing or person present or near . . . , *esp. one just mentioned*") (internal quotation marks omitted; emphasis added).

[36] The suggestion in the Sixth Circuit's opinion (App. 19a-20a & n.9) that an incumbent could refuse to interconnect with a competitor's self-provisioned entrance facility — and instead require the competitor to interconnect with an incumbent-provided entrance facility — was incorrect. If a competitor builds an entrance facility and seeks to interconnect at a tech-

Third, the referenced "facilities" and "interconnection facilities" are limited to those that competitors "need" (*TRO* ¶ 366) or "require" (*TRRO* ¶ 140) to interconnect. The words "need" and "require" must have some meaning and cannot be read to mean whatever facilities competitors might "want" or "prefer."[37] Yet that is effectively how the government and petitioners read those words, which they never expressly address. The government thus takes the position that a competitor can demand continued TELRIC-priced access to *any* entrance facility it had obtained under the FCC's since-eliminated unbundling rules and was using to exchange traffic with the incumbent. *See* Gov't Br. 12-13, 23, 25, 29. Petitioners likewise give these words no meaning, with Talk America claiming (at 29) that AT&T's obligation to provide TELRIC-priced entrance facilities is "absolute."[38]

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nically feasible point within AT&T's network, AT&T is obligated to interconnect the competitor's entrance facility at that point. *See* 47 U.S.C. § 251(c)(2)(B). Even so, that suggestion was unnecessary to the Sixth Circuit's determination that the Michigan commission unlawfully required AT&T to provide entrance facilities at TELRIC rates.

[37] In *Verizon*, this Court similarly stressed that the combinations regulation that it sustained as analogous to § 251(c)(2), *see supra* pp. 21-22, applied only when the competitor is "unable" to make the combination itself. 535 U.S. at 534; *see id.* ("when requesting carriers cannot"), at 535 ("when the entrant is unable to do the job itself"), at 538 ("when the requesting carrier is unable to combine").

[38] The CPUC's claim (at 29 n.8) that a competitor "requires" an entrance facility whenever "it does not have one of its own" does not address the relevant question, which is whether the competitor requires the facility from the incumbent at TELRIC rates. *See TRRO* ¶ 140.

In fact, as the FCC found, competitors neither "need" nor "require" entrance facilities from incumbents at any price, because they can deploy their own entrance facilities or lease them from third parties. *See TRRO* ¶¶ 138-139, 141. Of course, there are facilities that competitors "need" or "require" in order to interconnect their own entrance facilities to a point within an incumbent's central office as an accommodation of interconnection: namely, the cross-connect cables, conduits, riser space, and ports that AT&T provides at TELRIC prices to competitors that supply their own entrance facilities. *See supra* pp. 28-29. For these reasons, the government is wrong to assert (at 20-21) that the FCC would have had no reason to refer to "interconnection facilities" in paragraph 140 of the *Triennial Review Remand Order* unless it meant "entrance facilities."

Fourth, yet another barrier to petitioners' and the government's reading of the *Triennial Review* orders is the Commission's finding that entrance facilities "are not inherently a part of the incumbent LEC's local network" and "exist *outside* the incumbent LEC's local network." *TRO* ¶ 366. The clear implication of this finding is (as the D.C. Circuit would recognize) that entrance facilities are more properly treated as part of the *competitor's* local network. *See USTA II*, 359 F.3d at 586 (finding it "anomalous that [competitors] do not themselves provide" their own entrance facilities). Thus, in the government's view, paragraph 366 obligates incumbents, to comply with their duty to provide interconnection at a "point within the [incumbent's] network," to furnish transport facilities that are not part of that network. That contradiction, which the government makes no attempt to address, is further evidence that the government's reading of paragraph 366 is erroneous.

The government implicitly acknowledges as much when (at 23) it claims support for its position from the FCC's supposed conclusion in the *Triennial Review Remand Order* that entrance facilities are part of the incumbent's network. Yet the government never explains how its current position – that § 251(c)(2) requires entrance facilities — made sense at the time of the *Triennial Review Order*, when the FCC allegedly first embraced that position.[39]

Fifth, the efforts of petitioners and their *amici* to bolster their interpretations of the *Triennial Review* orders by distinguishing between competitors' uses of entrance facilities is unavailing. Even if the FCC's analysis of impairment under § 251(c)*(3)* in those orders were limited to entrance facilities when used for backhaul — and it plainly was not, *see TRRO* ¶¶ 138-139, 141; *supra* note 13 — that would not show that the Commission's statements in those orders are properly read as creating an affirmative obligation to provide entrance facilities under § 251(c)*(2)*.

Finally, the government's reliance (at 18-19) on other rules supposedly permitting a competitor to use a facility for one purpose but not another – even if accurately described — would not show that the

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[39] In fact, the *Triennial Review Remand Order* did not find that entrance facilities are within the incumbent's "local network." That order did not mention, let alone reverse, the *Triennial Review Order*'s determination that entrance facilities exist outside the incumbents' local networks. *Cf. TRRO* ¶ 137 n.383 (observing that the *USTA II* court "expressed skepticism that incumbent LECs should be required to build entrance facilities under any circumstances").

FCC's statements in the *Triennial Review* orders are reasonably read to impose such a use-specific requirement for entrance facilities.[40] Similarly, Talk America's attempted analogy (at 14-18, 34-36) to pre-1996 Act FCC orders requiring the tariffing of facilities for purchase by interconnecting carriers is misplaced. Indeed, AT&T's position is that it should be permitted to charge its tariffed rates for entrance facilities. Moreover, the orders that Talk America cites were adopted under 47 U.S.C. § 201, which (unlike § 251(c)(2)) obligates carriers "to establish physical connections with other carriers, to establish through routes . . . . and *to establish and provide facilities* and regulations for operating such through routes." 47 U.S.C. § 201(a) (emphasis added).

For all those reasons, petitioners' and the government's efforts to read the *Triennial Review* orders as purporting to require entrance facilities under § 251(c)(2) are plainly incorrect. *Cf. Norfolk Southern Ry. Co. v. Shanklin*, 529 U.S. 344, 356 (2000) (agency's regulatory interpretation must be rejected when it is "inconsistent with the text" of the regulation). Instead, the only reasonable interpretation of the FCC's statements in those orders is that "interconnection facilities" and "entrance facilities" are different things, as the Sixth Circuit correctly concluded.

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[40] In fact, those other restrictions are based on the type of carrier using the facility; they do not restrict how a single carrier can use a facility to which it is permitted access. Thus, the FCC has prohibited wireless and long-distance carriers from obtaining UNEs for any purpose, while permitting competing local telephone companies to obtain UNEs and to use them for multiple purposes. *Compare* 47 C.F.R. § 51.309(b) *with id.* § 51.309(d). Similarly, the FCC barred traditional long-distance carriers from obtaining interconnection under § 251(c)(2), while allowing companies that provide competing local telephone service to obtain interconnection and to route long-distance traffic over those interconnection arrangements. *See id.* § 51.305(b); *Local Competition Order* ¶¶ 190-191.

C. Requiring Incumbents To Provide TELRIC-Priced Entrance Facilities Under § 251(c)(2) Conflicts with the 1996 Act's Policy of Encouraging Facilities-Based Competition

1. In the 1996 Act, Congress sought "[t]o promote competition and reduce regulation" in the telecommunications marketplace. Pub. L. No. 104-104, 110 Stat. 56 (preamble). To that end, the 1996 Act embodies a clear preference for "genuine, facilities-based competition." *USTA II*, 359 F.3d at 576, 579. That means a telecommunications marketplace with multiple providers using their own equipment to serve customers, rather than "synthetic" competition, *Covad*, 450 F.3d at 548 (internal quotation marks omitted), in which competitors depend on the facilities of incumbents. *See Illinois Bell II*, 548 F.3d at 610 ("as long as requesting carriers rely on network services supplied by incumbent local exchange carriers, competition is hampered"). Indeed, today, 15 years since Congress passed the Act, that is how competition has developed, with cable companies, wireless carriers, and Voice-over-Internet-Protocol providers, like Vonage, successfully competing for customers nationwide without leasing TELRIC-priced facilities from incumbents.

To promote that transition to facilities-based competition, the 1996 Act included some extraordinary measures intended to serve as temporary market-opening mechanisms. The unbundling requirement in § 251(c)(3) is one such measure, "perhaps [the] most intrusive." *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 405 (2004); *see id.* at 410. The pricing standard in § 252(d)(1), which applies to both § 251(c)(3) and (c)(2), is another extraordinary measure. This Court has sustained the FCC's TELRIC pricing methodology implementing that standard, but only as applied to § 251(c)(3), and then only in recognition that paragraph (c)(3), properly interpreted, is limited to "bottleneck" facilities. *Verizon*, 535 U.S. at 510 & n.27, 515-17; *accord Local Competition Order* ¶ 702.[41]

As the D.C. Circuit and the FCC have explained on several occasions, there are well-recognized competitive harms that flow from mandating TELRIC pricing of non-bottleneck facilities. Far from being "an unqualified good," such mandates "inflict" significant costs "on the economy." *USTA I*, 290 F.3d at 429. Forcing incumbents to charge very low, regulated rates for access to their networks "reduce[s] or eliminate[s] the incentive for an [incumbent] to invest in innovation" because "it will have to share the rewards with [competitors]." *Id.* at 424. Likewise, TELRIC pricing of facilities subject to competitive supply creates a disincentive "for a [competitor] to innovate" or to invest in its own network facilities because "it can get the element[s] cheaper" from the incumbent. *Id.*; *accord TRRO* ¶ 36.[42]

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[41] The facilities and equipment within its central offices that AT&T provides to accommodate interconnection, *see supra* pp. 28-29, are effectively bottleneck items. Those items are located in restricted areas of AT&T's central offices that competitors are not permitted to enter. *See Local Competition Order* ¶ 598 (allowing incumbents "to require reasonable security arrangements to separate an entrant's collocation space from the incumbent LEC's facilities" and noting that such "physical security arrangements . . . protect both the [incumbent's] and competitor's equipment from interference by unauthorized parties"). Moreover, to connect its entrance facility to an AT&T switch, a competitor needs access to particular equipment inside AT&T's central office. Thus, for example, a competitor cannot use just any port to access AT&T's switch; it needs to use a port attached to that particular switch. Because a competitor can neither access the areas within AT&T's central offices where interconnection occurs nor duplicate the particular interconnection facilities within those central offices, the facilities and equipment that AT&T provides to accommodate interconnection are effectively bottleneck items.

Entrance facilities are not bottleneck elements: the FCC found in 2005 not only that entrance facilities have "unique operational and economic characteristics" that render "self-deployment" and "alternative wholesale supply" possible, but also that it was undisputed that competitors were in fact "increasingly relying on competitively provided entrance facilities," which "are widely available." *TRRO* ¶¶ 138-139, 141. Neither petitioners nor any of their *amici* make any claim (let alone any showing) that entrance facilities are bottleneck elements.

Because entrance facilities are not bottleneck facilities, requiring incumbents to provide them at TELRIC rates contradicts the purpose of the 1996 Act, which was not "to guarantee competitors access to [incumbents'] network elements at the lowest price that government may lawfully mandate," but instead "to stimulate competition — preferably genuine, facilities-based competition." *USTA II*, 359 F.3d at 576; *see Iowa Utils. Bd.*, 525 U.S. at 429 (Breyer, J., concurring in part and dissenting in part) ("It is in the *un* shared, not in the shared, portions of the enterprise that meaningful competition would likely emerge.").

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[42] *See also Iowa Utils. Bd.*, 525 U.S. at 429 (Breyer, J., concurring in part and dissenting in part) ("Nor can one guarantee that firms will undertake the investment necessary to produce complex technological innovations knowing that any competitive advantage deriving from those innovations will be dissipated by the sharing requirement."); *USTA II*, 359 F.3d at 572 (TELRIC pricing for non-bottleneck elements "discourage[s] . . . investment in innovation"); *USTA I*, 290 F.3d at 429 (TELRIC pricing for non-bottleneck elements creates "disincentives to research and development by both [incumbents] and [competitors]"); *TRRO* ¶ 218 (TELRIC pricing for non-bottleneck elements can "seriously undermine infrastructure investment and hinder the development of genuine, facilities-based competition"); *TRO* ¶ 656 (TELRIC pricing for non-bottleneck elements is "no[t] necessary to protect the public interest").

Even more anticompetitive is the potential obligation of incumbents to build new entrance facilities for competitors at TELRIC rates. As the FCC recognized in the *Triennial Review Remand Order*, competitors "have a unique degree of control over the cost of entrance facilities . . . because they can choose the location of their own switches." *TRRO* ¶ 138. Requiring incumbents to provide competitors with newly built entrance facilities would dramatically reduce any incentive for competitors to act efficiently in choosing where to locate their switches in relation to their chosen point of interconnection.

The government's effort (at 25 n.7) to limit this case to "existing facilities" is unpersuasive. The interconnection-agreement language that the Michigan commission imposed, *see supra* p. 13, is not limited to those TELRIC-priced facilities already in place. The Michigan commission's order likewise reflects no such limitation. *See* App. 185a (competitors "have a right to entrance facilities"). And neither petitioner has disclaimed the view that AT&T must establish new TELRIC-priced circuits on existing facilities or construct new TELRIC-priced facilities (where facilities do not exist or existing facilities are at capacity). *See also* CPUC Br. 22 (asserting that § 251(c)(2) requires an incumbent to provide "existing or new" entrance facilities). Finally, the government itself suggests (at 23) that "the governing standard" is "whether providing competitive LECs access to those entrance facilities for interconnection is technically feasible," not whether the entrance facility was obtained while the FCC still required unbundled access to such facilities under § 251(c)(3). The government's statement (at 25 n.7) that the FCC "has not ruled on whether" incumbents must "build new entrance facilities for a competitor's use" is thus cold comfort to incumbents such as AT&T. Even so, the government's refusal to defend petitioners' position insofar as it extends to construction of new facilities is effectively a concession that obligating incumbents to build entrance facilities (or even to establish new circuits on existing facilities) at TELRIC rates would contravene the policy of the 1996 Act.

2. Neither petitioners nor their *amici* present a coherent policy rationale for the result they seek. In particular, there is no attempt in the government's *amicus* brief or the FCC orders on which the government relies to square the requirement to provide TELRIC-priced entrance facilities under § 251(c)(2) with the 1996 Act's purpose. That omission further undermines any claim for deference to the government's *amicus* brief or the FCC orders. The few policy-based assertions that petitioners and their *amici* do make are without merit.

a. The Michigan commission incorrectly asserts (at 32) that the Sixth Circuit's decision places a "burden" on a competitor to "recreate an entire network." That claim ignores that this case involves only the transport facility connecting two networks. Nothing in the Sixth Circuit's decision affects competitors' ability to resell incumbents' services under

§ 251(c)(4) or to obtain access to elements of incumbents' networks under the FCC's existing rules implementing § 251(c)(3). That would include, for example, so-called "last mile facilities," such as the local loops made of copper wire connecting residential customer premises to switches, which the FCC has found to be bottleneck facilities. *See TRO* ¶¶ 199, 348.

b. Contrary to Sprint's and the CPUC's claims (and the government's passing assertion), the court of appeals' decision does not permit incumbents to increase prices for entrance facilities "unilaterally." Sprint Br. 2, 15; *see* CPUC Br. 15 (Sixth Circuit decision allows incumbents to "charge competition-dampening rates") (internal quotation marks omitted); Gov't Br. 15 (Sixth Circuit decision permits incumbents to charge "unregulated rate[s]"). As an initial matter, the prices that AT&T seeks to charge are set out in state and federal tariffs. *See Illinois Bell I*, 526 F.3d at 1072 (recognizing that "AT&T wants to be able to charge the tariff price" for entrance facilities); 47 U.S.C. § 201(b) (requiring charges for communication services to be "just and reasonable"). Because AT&T's tariffed rates for entrance facilities are subject to regulatory oversight, it is incorrect to say that, under the Sixth Circuit's decision, rates for access to entrance facilities would be "unregulated" or that incumbents could raise those rates "unilaterally."

More fundamentally, the upshot of the FCC's conclusion that competitors are not impaired in their ability to provide service without access to entrance facilities under § 251(c)(3) is that competitors can build entrance facilities themselves or obtain them from competitive providers. *See TRRO* ¶¶ 138-139.

141. As the FCC found, entrance facilities "are less costly to build, are more widely available from alternative providers, and have greater revenue potential than dedicated transport between incumbent LEC central offices." *Id.* ¶ 141. Competitors simply do not "need" access to *incumbents'* entrance facilities — at any price. Accordingly, if competitors are dissatisfied with incumbents' tariffed rates for entrance facilities, they can lease those facilities from another provider or build their own entrance facilities.

c. Equally erroneous is Sprint's assertion (at 28) that, under the decision below, its costs to provide wireless service will increase. That claim is based on the false premise that, until now, Sprint's wireless operations have been leasing entrance facilities from incumbents at TELRIC rates. In fact, to the extent Sprint has been leasing entrance facilities from AT&T, it has been paying AT&T's tariffed rates.[43] Thus, Sprint is not seeking to prevent a price increase; rather, it is hoping for a windfall in the form of lower rates for facilities that it uses to transport traffic to and from AT&T's network. Moreover, Sprint's evident failure even to assert an entitlement to TELRIC-priced entrance facilities under § 251(c)(2) for years after the 1996 Act's enactment undermines the claim that such an obligation has long existed.

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[43] Wireless carriers, such as Sprint, have long been barred from obtaining unbundled network elements under § 251(c)(3). *See TRRO* ¶ 36 & n.108 (explaining that "wireless carriers do not currently use UNEs in their provision of mobile wireless services" and refusing to allow wireless carriers to lease UNEs because of their demonstrated ability to compete "without access to UNEs").

d. Finally, petitioners and the government are incorrect to the extent they suggest that requiring incumbents to provide TELRIC-priced entrance facilities under § 251(c)(2) is sensible as a policy matter because, when used for backhauling, entrance facilities carry traffic between customers of a competitor. *Cf. Pacific Bell*, 621 F.3d at 847 (asserting that, "[w]here a competitive LEC uses an interconnection facility for backhaul, only the competitive LEC benefits — both the originator and the recipient of the call are competitive LEC customers"); MPSC Br. 25, 27.

As an initial matter, "backhauling" is not limited to calls between customers of a competitor (or of a competitor and customers of a wireless carrier).[44] "Backhauling" describes a competitor's use of an entrance facility to connect its own switch to a loop (the wire connecting a customer premises to a switch) that the competitor obtained from an incumbent as an unbundled element under § 251(c)(3). The competitor then uses its switch to provide telephone service to the customer connected to the unbundled loop. *See, e.g., TRO* ¶ 480. Calls "backhauled" to the competitor's switch over that entrance facility might then be routed from the switch to other customers of the competitor (or to a wireless carrier), but also might be routed to customers of an incumbent, as Sprint recognizes (at 9). Thus, as a policy matter, the use of entrance facilities for backhauling cannot be distinguished from the use of entrance facilities to exchange traffic on the basis that only the competitor "benefits" (*Pacific Bell*, 621 F.3d at 847) from backhauling.

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[44] For examples of misunderstandings of backhauling, see Talk Am. Br. 26 (asserting that backhauling occurs when a competitor uses entrance facilities "to carry traffic to and from its end users"); MPSC Br. 24-25 (illustrating backhauling as a call between two "competitive-carrier customers"); Gov't Br. 5-6 & n.4 (asserting that backhauling involves a call between two customers of a competitor or a call between a competitor's customer and a customer of a wireless carrier).

In all events, even if petitioners and their *amici* were correct that backhauling uniquely involves only a competitor's customers, that would not provide a policy justification for the result they seek. In particular, it would not explain why an incumbent should be required to provide competitors with entrance facilities at TELRIC rates, when the FCC has held that competitors can readily build those facilities themselves or buy them from a third party. *See TRRO* ¶¶ 138-139, 141.

* * *

Nothing in the text, structure, or purposes of the 1996 Act supports the claim of petitioners and their *amici* that the 1996 Act — a statute intended to promote facilities-based competition and to reduce regulation — obligates AT&T to provide entrance facilities to its competitors at artificially low prices, so that competitors can connect their own facilities and equipment to a point within AT&T's local network. The court of appeals was correct: if a competitor "chooses" to obtain an entrance facility from AT&T — rather than to "build its own entrance facility," "rent someone else's," or "connect" without using an entrance facility — the competitor "must pay the rates" in AT&T's tariffs. App. 32a.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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STATUTORY AND REGULATORY PROVISIONS INVOLVED

1. 47 U.S.C. § 201 provides:

47 U.S.C. § 201. Service and charges

(a) It shall be the duty of every common carrier engaged in interstate or foreign communication by wire or radio to furnish such communication service upon reasonable request therefor; and, in accordance with the orders of the Commission, in cases where the Commission, after opportunity for hearing, finds such action necessary or desirable in the public interest, to establish physical connections with other carriers, to establish through routes and charges applicable thereto and the divisions of such charges, and to establish and provide facilities and regulations for operating such through routes.

(b) All charges, practices, classifications, and regulations for and in connection with such communication service, shall be just and reasonable, and any such charge, practice, classification, or regulation that is unjust or unreasonable is declared to be unlawful: *Provided*, That communications by wire or radio subject to this chapter may be classified into day, night, repeated, unrepeated, letter, commercial, press, Government, and such other classes as the Commission may decide to be just and reasonable, and different charges may be made for the different classes of communications: *Provided further*, That nothing in this chapter or in any other provision of law shall be construed to prevent a common carrier subject to this chapter from entering into or operating under any contract with any common carrier not subject to this chapter, for the exchange of their ser-vices, if the Commission is of the opinion that such contract is not contrary to the public interest: *Provided further*, That nothing in this chapter or in any other provision of law shall prevent a common carrier subject to this chapter from furnishing reports of positions of ships at sea to newspapers of general circulation, either at a nominal charge or without charge, provided the name of such common carrier is displayed along with such ship position reports. The Commission may prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this chapter.

2. 47 U.S.C. § 251 provides:

47 U.S.C. § 251. Interconnection

(a) General duty of telecommunications carriers

Each telecommunications carrier has the duty –

(1) to interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers; and

(2) not to install network features, functions, or capabilities that do not comply with the guidelines and standards established pursuant to section 255 or 256 of this title.

(b) Obligations of all local exchange carriers

Each local exchange carrier has the following duties:

(1) Resale

The duty not to prohibit, and not to impose unreasonable or discriminatory conditions or limitations on, the resale of its telecommunications services.

(2) Number portability

The duty to provide, to the extent technically feasible, number portability in accordance with requirements prescribed by the Commission.

(3) Dialing parity

The duty to provide dialing parity to competing providers of telephone exchange service and telephone toll service, and the duty to permit all such providers to have nondiscriminatory access to telephone numbers, operator services, directory assistance, and directory listing, with no unreasonable dialing delays.

(4) Access to rights-of-way

The duty to afford access to the poles, ducts, conduits, and rights-of-way of such carrier to competing providers of telecommunications services on rates, terms, and conditions that are consistent with section 224 of this title.

(5) Reciprocal compensation

The duty to establish reciprocal compensation arrangements for the transport and termination of telecommunications.

(c) Additional obligations of incumbent local exchange carriers

In addition to the duties contained in subsection (b) of this section, each incumbent local exchange carrier has the following duties:

(1) Duty to negotiate

The duty to negotiate in good faith in accordance with section 252 of this title the particular terms and conditions of agreements to fulfill the duties described in paragraphs (1) through (5) of subsection (b) of this section and this subsection. The requesting telecommunications carrier also has the duty to negotiate in good faith the terms and conditions of such agreements.

(2) Interconnection

The duty to provide, for the facilities and equipment of any requesting telecommunications carrier, interconnection with the local exchange carrier's network –

(A) for the transmission and routing of telephone exchange service and exchange access;

(B) at any technically feasible point within the carrier's network;

(C) that is at least equal in quality to that provided by the local exchange carrier to itself or to any subsidiary, affiliate, or any other party to which the carrier provides interconnection; and

(D) on rates, terms, and conditions that are just, reasonable, and nondiscriminatory, in accordance with the terms and conditions of the agreement and the requirements of this section and section 252 of this title.

(3) Unbundled access

The duty to provide, to any requesting telecommunications carrier for the provision of a telecommunications service, nondiscriminatory access to network elements on an unbundled basis at any technically feasible point on rates, terms, and conditions that are just, reasonable, and nondiscriminatory in accordance with the terms and conditions of the agreement and the requirements of this section and section 252 of this title. An incumbent local exchange carrier shall provide such unbundled network elements in a manner that allows requesting carriers to combine such elements in order to provide such telecommunications service.

(4) Resale

The duty –

(A) to offer for resale at wholesale rates any telecommunications service that the carrier provides at retail to subscribers who are not telecommunications carriers; and

(B) not to prohibit, and not to impose unreasonable or discriminatory conditions or limitations on, the resale of such telecommunications service, except that a State commission may, consistent with regulations prescribed by the Commission under this section, prohibit a reseller that obtains at wholesale rates a telecommunications service that is available at retail only to a category of subscribers from offering such service to a different category of subscribers.

(5) Notice of changes

The duty to provide reasonable public notice of changes in the information necessary for the transmission and routing of services using that local exchange carrier's facilities or networks, as well as of any other changes that would affect the interoperability of those facilities and networks.

(6) Collocation

The duty to provide, on rates, terms, and conditions that are just, reasonable, and nondiscriminatory, for physical collocation of equipment necessary for interconnection or access to unbundled network elements at the premises of the local exchange carrier, except that the carrier may provide for virtual collocation if the local exchange carrier demonstrates to the State commission that physical collocation is not practical for technical reasons or because of space limitations.

(d) Implementation

(1) In general

Within 6 months after February 8, 1996, the Commission shall complete all actions necessary to establish regulations to implement the requirements of this section.

(2) Access standards

In determining what network elements should be made available for purposes of subsection (c)(3) of this section, the Commission shall consider, at a minimum, whether –

(A) access to such network elements as are proprietary in nature is necessary; and

(B) the failure to provide access to such network elements would impair the ability of the telecommunications carrier seeking access to provide the services that it seeks to offer.

(3) Preservation of State access regulations

In prescribing and enforcing regulations to implement the requirements of this section, the Commission shall not preclude the enforcement of any regulation, order, or policy of a State commission that –

(A) establishes access and interconnection obligations of local exchange carriers;

(B) is consistent with the requirements of this section; and

(C) does not substantially prevent implementation of the requirements of this section and the purposes of this part.

(e) Numbering administration

(1) Commission authority and jurisdiction

The Commission shall create or designate one or more impartial entities to administer telecommunications numbering and to make such numbers available on an equitable basis. The Commission shall have exclusive jurisdiction over those portions of the North American Numbering Plan that pertain to the United States. Nothing in this paragraph shall preclude the Commission from delegating to State commissions or other entities all or any portion of such jurisdiction.

(2) Costs

The cost of establishing telecommunications numbering administration arrangements and number portability shall be borne by all telecommunications carriers on a competitively neutral basis as determined by the Commission.

(3) Universal emergency telephone number

The Commission and any agency or entity to which the Commission has delegated authority under this subsection shall designate 9-1-1 as the universal emergency telephone number within the United States for reporting an emergency to appropriate authorities and requesting assistance. The designation shall apply to both wireline and wireless telephone service. In making the designation, the Commission (and any such agency or entity) shall provide appropriate transition periods for areas in which 9-1-1 is not in use as an emergency telephone number on October 26, 1999.

(f) Exemptions, suspensions, and modifications

(1) Exemption for certain rural telephone companies

(A) Exemption

Subsection (c) of this section shall not apply to a rural telephone company until (i) such company has received a bona fide request for interconnection, services, or network elements, and (ii) the State commission determines (under subparagraph (B)) that such request is not unduly economically burdensome, is technically feasible, and is consistent with section 254 of this title (other than subsections (b)(7) and (c)(1)(D) thereof).

(B) State termination of exemption and implementation schedule

The party making a bona fide request of a rural telephone company for interconnection, services, or network elements shall submit a notice of its request to the State commission. The State commission shall conduct an inquiry for the purpose of determining whether to terminate the exemption under subparagraph (A). Within 120 days after the State commission receives notice of the request, the State commission shall terminate the exemption if the request is not unduly economically burdensome, is technically feasible, and is consistent with section 254 of this title (other than subsections (b)(7) and (c)(1)(D) thereof). Upon termination of the exemption, a State commission shall establish an implementation schedule for compliance with the request that is consistent in time and manner with Commission regulations.

(C) Limitation on exemption

The exemption provided by this paragraph shall not apply with respect to a request under subsection (c) of this section, from a cable operator providing video programming, and seeking to provide any telecommunications service, in the area in which the rural telephone company provides video programming. The limitation contained in this subparagraph shall not apply to a rural telephone company that is providing video programming on February 8, 1996.

(2) Suspensions and modifications for rural carriers

A local exchange carrier with fewer than 2 percent of the Nation's subscriber lines installed in the aggregate nationwide may petition a State commission for a suspension or modification of the application of a requirement or requirements of subsection (b) or (c) of this section to telephone exchange service facilities specified in such petition. The State commission shall grant such petition to the extent that, and for such duration as, the State commission determines that such suspension or modification –

(A) is necessary –

(i) to avoid a significant adverse economic impact on users of telecommunications services generally;

(ii) to avoid imposing a requirement that is unduly economically burdensome; or

(iii) to avoid imposing a requirement that is technically infeasible; and

(B) is consistent with the public interest, convenience, and necessity.

The State commission shall act upon any petition filed under this paragraph within 180 days after receiving such petition. Pending such action, the State commission may suspend enforcement of the requirement or requirements to which the petition applies with respect to the petitioning carrier or carriers.

(g) Continued enforcement of exchange access and interconnection requirements

On and after February 8, 1996, each local exchange carrier, to the extent that it provides wireline services, shall provide exchange access, information access, and exchange services for such access to interexchange carriers and information service providers in accordance with the same equal access and nondiscriminatory interconnection restrictions and obligations (including receipt of compensation) that apply to such carrier on the date immediately preceding February 8, 1996 under any court order, consent decree, or regulation, order, or policy of the Commission, until such restrictions and obligations are explicitly superseded by regulations prescribed by the Commission after February 8, 1996. During the period beginning on February 8, 1996 and until such restrictions and obligations are so superseded, such restrictions and obligations shall be enforceable in the same manner as regulations of the Commission.

(h) Definition of incumbent local exchange carrier

(1) Definition

For purposes of this section, the term 'incumbent local exchange carrier' means, with respect to an area, the local exchange carrier that –

(A) on February 8, 1996, provided telephone exchange service in such area; and

(B)(i) on February 8, 1996, was deemed to be a member of the exchange carrier association pursuant to section 69.601(b) of the Commission's regulations (47 C.F.R. 69.601(b)); or

(ii) is a person or entity that, on or after February 8, 1996, became a successor or assign of a member described in clause (i).

(2) Treatment of comparable carriers as incumbents

The Commission may, by rule, provide for the treatment of a local exchange carrier (or class or category thereof) as an incumbent local exchange carrier for purposes of this section if –

(A) such carrier occupies a position in the market for telephone exchange service within an area that is comparable to the position occupied by a carrier described in paragraph (1);

(B) such carrier has substantially replaced an incumbent local exchange carrier described in paragraph (1); and

(C) such treatment is consistent with the public interest, convenience, and necessity and the purposes of this section.

(i) Savings provision

Nothing in this section shall be construed to limit or otherwise affect the Commission's authority under section 201 of this title.

3. 47 U.S.C. § 252 provides:

47 U.S.C. § 252. Procedures for negotiation, arbitration, and approval of agreements

(a) Agreements arrived at through negotiation

(1) Voluntary negotiations

Upon receiving a request for interconnection, services, or network elements pursuant to section 251 of this title, an incumbent local exchange carrier may negotiate and enter into a binding agreement with the requesting telecommunications carrier or carriers without regard to the standards set forth in subsections (b) and (c) of section 251 of this title. The agreement shall include a detailed schedule of itemized charges for interconnection and each service or network element included in the agreement. The agreement, including any interconnection agreement negotiated before February 8, 1996, shall be submitted to the State commission under subsection (e) of this section.

(2) Mediation

Any party negotiating an agreement under this section may, at any point in the negotiation, ask a State commission to participate in the negotiation and to mediate any differences arising in the course of the negotiation.

(b) Agreements arrived at through compulsory arbitration

(1) Arbitration

During the period from the 135th to the 160th day (inclusive) after the date on which an incumbent local exchange carrier receives a request for negotiation under this section, the carrier or any other party to the negotiation may petition a State commission to arbitrate any open issues.

(2) Duty of petitioner

(A) A party that petitions a State commission under paragraph (1) shall, at the same time as it submits the petition, provide the State commission all relevant documentation concerning –

(i) the unresolved issues;

(ii) the position of each of the parties with respect to those issues; and

(iii) any other issue discussed and resolved by the parties.

(B) A party petitioning a State commission under paragraph (1) shall provide a copy of the petition and any documentation to the other party or parties not later than the day on which the State commission receives the petition.

(3) Opportunity to respond

A non-petitioning party to a negotiation under this section may respond to the other party's petition and provide such additional information as it wishes within 25 days after the State commission receives the petition.

(4) Action by State commission

(A) The State commission shall limit its consideration of any petition under paragraph (1) (and any response thereto) to the issues set forth in the petition and in the response, if any, filed under paragraph (3).

(B) The State commission may require the petitioning party and the responding party to provide such information as may be necessary for the State commission to reach a decision on the unresolved issues. If any party refuses or fails unreasonably to respond on a timely basis to any reasonable request from the State commission, then the State commission may proceed on the basis of the best information available to it from whatever source derived.

(C) The State commission shall resolve each issue set forth in the petition and the response, if any, by imposing appropriate conditions as required to implement subsection (c) of this section upon the parties to the agreement, and shall conclude the resolution of any unresolved issues not later than 9 months after the date on which the local exchange carrier received the request under this section.

(5) Refusal to negotiate

The refusal of any other party to the negotiation to participate further in the negotiations, to cooperate with the State commission in carrying out its function as an arbitrator, or to continue to negotiate in good faith in the presence, or with the assistance, of the State commission shall be considered a failure to negotiate in good faith.

(c) Standards for arbitration

In resolving by arbitration under subsection (b) of this section any open issues and imposing conditions upon the parties to the agreement, a State commission shall –

(1) ensure that such resolution and conditions meet the requirements of section 251 of this title, including the regulations prescribed by the Commission pursuant to section 251 of this title;

(2) establish any rates for interconnection, services, or network elements according to subsection (d) of this section; and

(3) provide a schedule for implementation of the terms and conditions by the parties to the agreement.

(d) Pricing standards

(1) Interconnection and network element charges

Determinations by a State commission of the just and reasonable rate for the interconnection of facilities and equipment for purposes of subsection (c)(2) of section 251 of this title, and the just and reasonable rate for network elements for purposes of subsection (c)(3) of such section –

(A) shall be –

(i) based on the cost (determined without reference to a rate-of-return or other rate-based proceeding) of providing the interconnection or network element (whichever is applicable), and

(ii) nondiscriminatory, and

(B) may include a reasonable profit.

(2) Charges for transport and termination of traffic

(A) In general

For the purposes of compliance by an incumbent local exchange carrier with section 251(b)(5) of this title, a State commission shall not consider the terms and conditions for reciprocal compensation to be just and reasonable unless –

(i) such terms and conditions provide for the mutual and reciprocal recovery by each carrier of costs associated with the transport and termination on each carrier's network facilities of calls that originate on the network facilities of the other carrier; and

(ii) such terms and conditions determine such costs on the basis of a reasonable approximation of the additional costs of terminating such calls.

(B) Rules of construction

This paragraph shall not be construed –

(i) to preclude arrangements that afford the mutual recovery of costs through the offsetting of reciprocal obligations, including arrangements that waive mutual recovery (such as bill-and-keep arrangements); or

(ii) to authorize the Commission or any State commission to engage in any rate regulation proceeding to establish with particularity the additional costs of transporting or terminating calls, or to require carriers to maintain records with respect to the additional costs of such calls.

(3) Wholesale prices for telecommunications services

For the purposes of section 251(c)(4) of this title, a State commission shall determine wholesale rates on the basis of retail rates charged to subscribers for the telecommunications service requested, excluding the portion thereof attributable to any marketing, billing, collection, and other costs that will be avoided by the local exchange carrier.

(e) Approval by State commission

(1) Approval required

Any interconnection agreement adopted by negotiation or arbitration shall be submitted for approval to the State commission. A State commission to which an agreement is submitted shall approve or reject the agreement, with written findings as to any deficiencies.

(2) Grounds for rejection

The State commission may only reject

(A) an agreement (or any portion thereof) adopted by negotiation under subsection (a) of this section if it finds that –

(i) the agreement (or portion thereof) discriminates against a telecommunications carrier not a party to the agreement; or

(ii) the implementation of such agreement or portion is not consistent with the public interest, convenience, and necessity; or

(B) an agreement (or any portion thereof) adopted by arbitration under subsection (b) of this section if it finds that the agreement does not meet the requirements of section 251 of this title, including the regulations prescribed by the Commission pursuant to section 251 of this title, or the standards set forth in subsection (d) of this section.

(3) Preservation of authority

Notwithstanding paragraph (2), but subject to section 253 of this title, nothing in this section shall prohibit a State commission from establishing or enforcing other requirements of State law in its review of an agreement, including requiring compliance with intrastate telecommunications service quality standards or requirements.

(4) Schedule for decision

If the State commission does not act to approve or reject the agreement within 90 days after submission by the parties of an agreement adopted by negotiation under subsection (a) of this section, or within 30 days after submission by the parties of an agreement adopted by arbitration under subsection (b) of this section, the agreement shall be deemed approved. No State court shall have jurisdiction to review the action of a State commission in approving or rejecting an agreement under this section.

(5) Commission to act if State will not act

If a State commission fails to act to carry out its responsibility under this section in any proceeding or other matter under this section, then the Commission shall issue an order preempting the State commission's jurisdiction of that proceeding or matter within 90 days after being notified (or taking notice) of such failure, and shall assume the responsibility of the State commission under this section with respect to the proceeding or matter and act for the State commission.

(6) Review of State commission actions

In a case in which a State fails to act as described in paragraph (5), the proceeding by the Commission under such paragraph and any judicial review of the Commission's actions shall be the exclusive remedies for a State commission's failure to act. In any case in which a State commission makes a determination under this section, any party aggrieved by such determination may bring an action in an appropriate Federal district court to determine whether the agreement or statement meets the requirements of section 251 of this title and this section.

(f) Statements of generally available terms

(1) In general

A Bell operating company may prepare and file with a State commission a statement of the terms and conditions that such company generally offers within that State to comply with the requirements of section 251 of this title and the regulations thereunder and the standards applicable under this section.

(2) State commission review

A State commission may not approve such statement unless such statement complies with subsection (d) of this section and section 251 of this title and the regulations thereunder. Except as provided in section 253 of this title, nothing in this section shall prohibit a State commission from establishing or enforcing other requirements of State law in its review of such statement, including requiring compliance with intrastate telecommunications service quality standards or requirements.

(3) Schedule for review

The State commission to which a statement is submitted shall, not later than 60 days after the date of such submission –

(A) complete the review of such statement under paragraph (2) (including any reconsideration thereof), unless the submitting carrier agrees to an extension of the period for such review; or

(B) permit such statement to take effect.

(4) Authority to continue review

Paragraph (3) shall not preclude the State commission from continuing to review a statement that has been permitted to take effect under subparagraph (B) of such paragraph or from approving or disapproving such statement under paragraph (2).

(5) Duty to negotiate not affected

The submission or approval of a statement under this subsection shall not relieve a Bell operating company of its duty to negotiate the terms and conditions of an agreement under section 251 of this title.

(g) Consolidation of State proceedings

Where not inconsistent with the requirements of this chapter, a State commission may, to the extent practical, consolidate proceedings under sections 214(e), 251(f), 253 of this title, and this section in order to reduce administrative burdens on telecommunications carriers, other parties to the proceedings, and the State commission in carrying out its responsibilities under this chapter.

(h) Filing required

A State commission shall make a copy of each agreement approved under subsection (e) of this section and each statement approved under subsection (f) of this section available for public inspection and copying within 10 days after the agreement or statement is approved. The State commission may charge a reasonable and nondiscriminatory fee to the parties to the agreement or to the party filing the statement to cover the costs of approving and filing such agreement or statement.

(i) Availability to other telecommunications carriers

A local exchange carrier shall make available any interconnection, service, or network element provided under an agreement approved under this section to which it is a party to any other requesting telecommunications carrier upon the same terms and conditions as those provided in the agreement.

(j) "Incumbent local exchange carrier" defined

For purposes of this section, the term "incumbent local exchange carrier" has the meaning provided in section 251(h) of this title.

4. 47 C.F.R. § 51.5 provides in relevant part:

§ 51.5 Terms and definitions.

Terms used in this part have the following meanings:

* * * * *

Interconnection. Interconnection is the linking of two networks for the mutual exchange of traffic. This term does not include the transport and termination of traffic.

* * * * *

Technically feasible. Interconnection, access to unbundled network elements, collocation, and other methods of achieving interconnection or access to unbundled network elements at a point in the network shall be deemed technically feasible absent technical or operational concerns that prevent the fulfillment of a request by a telecommunications carrier for such interconnection, access, or methods. A determination of technical feasibility does not include consideration of economic, accounting, billing, space, or site concerns, except that space and site concerns may be considered in circumstances where there is no possibility of expanding the space available. The fact that an incumbent LEC must modify its facilities or equipment to respond to such request does not determine whether satisfying such request is technically feasible. An incumbent LEC that claims that it cannot satisfy such request because of adverse network reliability impacts must prove to the state commission by clear and convincing evidence that such interconnection, access, or methods would result in specific and significant adverse network reliability impacts.

* * * * *

5. 47 C.F.R. § 51.305 provides:

§ 51.305 Interconnection.

(a) An incumbent LEC shall provide, for the facilities and equipment of any requesting telecommunications carrier, interconnection with the incumbent LEC's network:

(1) For the transmission and routing of telephone exchange traffic, exchange access traffic, or both;

(2) At any technically feasible point within the incumbent LEC's network including, at a minimum:

(i) The line-side of a local switch;

(ii) The trunk-side of a local switch;

(iii) The trunk interconnection points for a tandem switch;

(iv) Central office cross-connect points;

(v) Out-of-band signaling transfer points necessary to exchange traffic at these points and access call-related databases; and

(vi) The points of access to unbundled network elements as described in§ 51.319;

(3) That is at a level of quality that is equal to that which the incumbent LEC provides itself, a subsidiary, an affiliate, or any other party. At a minimum, this requires an incumbent LEC to design interconnection facilities to meet the same technical criteria and service standards that are used within the incumbent LEC's network. This obligation is not limited to a consideration of service quality as perceived by end users, and includes, but is not limited to, service quality as perceived by the requesting telecommunications carrier; and

(4) On terms and conditions that are just, reasonable, and nondiscriminatory in accordance with the terms and conditions of any agreement, the requirements of sections 251 and 252 of the Act, and the Commission's rules including, but not limited to, offering such terms and conditions equally to all requesting telecommunications carriers, and offering such terms and conditions that are no less favorable than the terms and conditions upon which the incumbent LEC provides such interconnection to itself. This includes, but is not limited to, the time within which the incumbent LEC provides such interconnection.

(b) A carrier that requests interconnection solely for the purpose of originating or terminating its interexchange traffic on an incumbent LEC's network and not for the purpose of providing to others telephone exchange service, exchange access service, or both, is not entitled to receive interconnection pursuant to section 251(c)(2) of the Act.

(c) Previous successful interconnection at a particular point in a network, using particular facilities, constitutes substantial evidence that interconnection is technically feasible at that point, or at substantially similar points, in networks employing substantially similar facilities. Adherence to the same interface or protocol standards shall constitute evidence of the substantial similarity of network facilities.

(d) Previous successful interconnection at a particular point in a network at a particular level of quality constitutes substantial evidence that interconnection is technically feasible at that point, or at substantially similar points, at that level of quality.

(e) An incumbent LEC that denies a request for interconnection at a particular point must prove to the state commission that interconnection at that point is not technically feasible.

(f) If technically feasible, an incumbent LEC shall provide two-way trunking upon request.

(g) An incumbent LEC shall provide to a requesting telecommunications carrier technical information about the incumbent LEC's network facilities sufficient to allow the requesting carrier to achieve interconnection consistent with the requirements of this section.

6. 47 C.F.R. § 51.315(d) (1997) provided:

§ 51.315 Combination of unbundled network elements.

* * * * *

(d) Upon request, an incumbent LEC shall perform the functions necessary to combine unbundled network elements with elements possessed by the requesting telecommunications carrier in any technically feasible manner.

* * * * *

7. 47 C.F.R. § 51.319(e) provides:

§ 51.319 Specific unbundling requirements.

* * * * *

(e) *Dedicated transport.* An incumbent LEC shall provide a requesting telecommunications carrier with nondiscriminatory access to dedicated transport on an unbundled basis, in accordance with section 251(c)(3) of the Act and this part, as set forth in paragraphs (e) through (e)(4) of this section. A "route" is a transmission path between one of an incumbent LEC's wire centers or switches and another of the incumbent LEC's wire centers or switches. A route between two points (*e.g.*, wire center or switch "A" and wire center or switch "Z") may pass through one or more intermediate wire centers or switches (*e.g.*, wire center or switch "X"). Transmission paths between identical end points (*e.g.*, wire center or switch "A" and wire center or switch "Z") are the same "route," irrespective of whether they pass through the same intermediate wire centers or switches, if any.

(1) *Definition.* For purposes of this section, dedicated transport includes incumbent LEC transmission facilities between wire centers or switches owned by incumbent LECs, or between wire centers or switches owned by incumbent LECs and switches owned by requesting telecommunications carriers, including, but not limited to, DS1-, DS3-, and OCn-capacity level services, as well as dark fiber, dedicated to a particular customer or carrier.

(2) *Availability.* (i) *Entrance facilities.* An incumbent LEC is not obligated to provide a requesting carrier with unbundled access to dedicated transport

that does not connect a pair of incumbent LEC wire centers.

(ii) *Dedicated DS1 transport.* Dedicated DS1 transport shall be made available to requesting carriers on an unbundled basis as set forth below. Dedicated DS1 transport consists of incumbent LEC interoffice transmission facilities that have a total digital signal speed of 1.544 megabytes per second and are dedicated to a particular customer or carrier.

(A) *General availability of DS1 transport.* Incumbent LECs shall unbundle DS1 transport between any pair of incumbent LEC wire centers except where, through application of tier classifications described in paragraph (e)(3) of this section, both wire centers defining the route are Tier 1 wire centers. As such, an incumbent LEC must unbundle DS1 transport if a wire center at either end of a requested route is not a Tier 1 wire center, or if neither is a Tier 1 wire center.

(B) *Cap on unbundled DS1 transport circuits.* A requesting telecommunications carrier may obtain a maximum of ten unbundled DS1 dedicated transport circuits on each route where DS1 dedicated transport is available on an unbundled basis.

(C) *Transition period for DS1 transport circuits.* For a 12-month period beginning on the effective date of the *Triennial Review Remand Order*, any DS1 dedicated transport UNE that a competitive LEC leases from the incumbent LEC as of that date, but which the incumbent LEC is not obligated to unbundle pursuant to paragraphs (e)(2)(ii)(A) or (e)(2)(ii)(B) of this section, shall be available for lease from the incumbent LEC at a rate equal to the higher of 115 percent of the rate the requesting carrier paid for the dedicated transport element on June 15, 2004, or, 115 percent of the rate the state commission has established or establishes, if any, between June 16, 2004, and the effective date of the *Triennial Review Remand Order*, for that dedicated transport element. Where incumbent LECs are not required to provide unbundled DS1 transport pursuant to paragraphs (e)(2)(ii)(A) or (e)(2)(ii)(B) of this section, requesting carriers may not obtain new DS1 transport as unbundled network elements.

(iii) *Dedicated DS3 transport.* Dedicated DS3 transport shall be made available to requesting carriers on an unbundled basis as set forth below. Dedicated DS3 transport consists of incumbent LEC interoffice transmission facilities that have a total digital signal speed of 44.736 megabytes per second and are dedicated to a particular customer or carrier.

(A) *General availability of DS3 transport.* Incumbent LECs shall unbundle DS3 transport between any pair of incumbent LEC wire centers except where, through application of tier classifications described in paragraph (e)(3) of this section, both wire centers defining the route are either Tier 1 or Tier 2 wire centers. As such, an incumbent LEC must unbundle DS3 transport if a wire center on either end of a requested route is a Tier 3 wire center.

(B) *Cap on unbundled DS3 transport circuits.* A requesting telecommunications carrier may obtain a maximum of 12 unbundled DS3 dedicated transport circuits on each route where DS3 dedicated transport is available on an unbundled basis.

(C) *Transition period for DS3 transport circuits.* For a 12-month period beginning on the effective date of the *Triennial Review Remand Order*, any DS3 dedicated transport UNE that a competitive LEC leases from the incumbent LEC as of that date, but which the incumbent LEC is not obligated to unbundle pursuant to paragraphs (e)(2)(iii)(A) or (e)(2)(iii)(B) of this section, shall be available for lease from the incumbent LEC at a rate equal to the higher of 115 percent of the rate the requesting carrier paid for the dedicated transport element on June 15, 2004, or, 115 percent of the rate the state commission has established or establishes, if any, between June 16, 2004, and the effective date of the *Triennial Review Remand Order*, for that dedicated transport element. Where incumbent LECs are not required to provide unbundled DS3 transport pursuant to paragraphs (e)(2)(iii)(A) or (e)(2)(iii)(B) of this section, requesting carriers may not obtain new DS3 transport as unbundled network elements.

(iv) *Dark fiber transport.* Dedicated dark fiber transport shall be made available to requesting carriers on an unbundled basis as set forth below. Dark fiber transport consists of unactivated optical interoffice transmission facilities.

(A) *General availability of dark fiber transport.* Incumbent LECs shall unbundle dark fiber transport between any pair of incumbent LEC wire centers except where, though application of tier classifications described in paragraph (e)(3) of this section, both wire centers defining the route are either Tier 1 or Tier 2 wire centers. As such, an incumbent LEC must unbundle dark fiber transport if a wire center on either end of a requested route is a Tier 3 wire center.

(B) *Transition period for dark fiber transport circuits.* For an 18-month period beginning on the effective date of the *Triennial Review Remand Order*, any dark fiber dedicated transport UNE that a competitive LEC leases from the incumbent LEC as of that date, but which the incumbent LEC is not obligated to unbundle pursuant to paragraphs (e)(2)(iv)(A) or (e)(2)(iv)(B) of this section, shall be available for lease from the incumbent LEC at a rate equal to the higher of 115 percent of the rate the requesting carrier paid for the dedicated transport element on June 15, 2004, or, 115 percent of the rate the state commission has established or establishes, if any, between June 16, 2004, and the effective date of the *Triennial Review Remand Order*, for that dedicated transport element. Where incumbent LECs are not required to provide unbundled dark fiber transport pursuant to paragraphs (e)(2)(iv)(A) or (e)(2)(iv)(B) of this section, requesting carriers may not obtain new dark fiber transport as unbundled network elements.

(3) *Wire center tier structure.* For purposes of this section, incumbent LEC wire centers shall be classified into three tiers, defined as follows:

(i) Tier 1 wire centers are those incumbent LEC wire centers that contain at least four fiber-based collocators, at least 38,000 business lines, or both. Tier 1 wire centers also are those incumbent LEC tandem switching locations that have no line-side switching facilities, but nevertheless serve as a point of traffic aggregation accessible by competitive LECs. Once a wire center is determined to be a Tier 1 wire center, that wire center is not subject to later reclassification as a Tier 2 or Tier 3 wire center.

(ii) Tier 2 wire centers are those incumbent LEC wire centers that are not Tier 1 wire centers, but contain at least 3 fiber-based collocators, at least

24,000 business lines, or both. Once a wire center is determined to be a Tier 2 wire center, that wire center is not subject to later reclassification as a Tier 3 wire center.

(iii) Tier 3 wire centers are those incumbent LEC wire centers that do not meet the criteria for Tier 1 or Tier 2 wire centers.

(4) *Routine network modifications.* (i) An incumbent LEC shall make all routine network modifications to unbundled dedicated transport facilities used by requesting telecommunications carriers where the requested dedicated transport facilities have already been constructed. An incumbent LEC shall perform all routine network modifications to unbundled dedicated transport facilities in a nondiscriminatory fashion, without regard to whether the facility being accessed was constructed on behalf, or in accordance with the specifications, of any carrier.

(ii) A routine network modification is an activity that the incumbent LEC regularly undertakes for its own customers. Routine network modifications include, but are not limited to, rearranging or splicing of cable; adding an equipment case; adding a doubler or repeater; installing a repeater shelf; and deploying a new multiplexer or reconfiguring an existing multiplexer. They also include activities needed to enable a requesting telecommunications carrier to light a dark fiber transport facility. Routine network modifications may entail activities such as accessing manholes, deploying bucket trucks to reach aerial cable, and installing equipment casings. Routine network modifications do not include the installation of new aerial or buried cable for a requesting telecommunications carrier.

* * * * *

8. 47 C.F.R. § 51.321 provides:

§ 51.321 Methods of obtaining interconnection and access to unbundled elements under section 251 of the Act.

(a) Except as provided in paragraph (e) of this section, an incumbent LEC shall provide, on terms and conditions that are just, reasonable, and nondiscriminatory in accordance with the requirements of this part, any technically feasible method of obtaining interconnection or access to unbundled network elements at a particular point upon a request by a telecommunications carrier.

(b) Technically feasible methods of obtaining interconnection or access to unbundled network elements include, but are not limited to:

(1) Physical collocation and virtual collocation at the premises of an incumbent LEC; and

(2) Meet point interconnection arrangements.

(c) A previously successful method of obtaining interconnection or access to unbundled network elements at a particular premises or point on any incumbent LEC's network is substantial evidence that such method is technically feasible in the case of substantially similar network premises or points. A requesting telecommunications carrier seeking a particular collocation arrangement, either physical or virtual, is entitled to a presumption that such arrangement is technically feasible if any LEC has deployed such collocation arrangement in any incumbent LEC premises.

(d) An incumbent LEC that denies a request for a particular method of obtaining interconnection or access to unbundled network elements on the incumbent LEC's network must prove to the state commission that the requested method of obtaining interconnection or access to unbundled network elements at that point is not technically feasible.

(e) An incumbent LEC shall not be required to provide for physical collocation of equipment necessary for interconnection or access to unbundled network elements at the incumbent LEC's premises if it demonstrates to the state commission that physical collocation is not practical for technical reasons or because of space limitations. In such cases, the incumbent LEC shall be required to provide virtual collocation, except at points where the incumbent LEC proves to the state commission that virtual collocation is not technically feasible. If virtual collocation is not technically feasible, the incumbent LEC shall provide other methods of interconnection and access to unbundled network elements to the extent technically feasible.

(f) An incumbent LEC shall submit to the state commission, subject to any protective order as the state commission may deem necessary, detailed floor plans or diagrams of any premises where the incumbent LEC claims that physical collocation is not practical because of space limitations. These floor plans or diagrams must show what space, if any, the incumbent LEC or any of its affiliates has reserved for future use, and must describe in detail the specific future uses for which the space has been reserved and the length of time for each reservation. An incumbent LEC that contends space for physical collocation is not available in an incumbent LEC premises must also allow the requesting carrier to tour the entire premises in question, not only the area in which space was denied, without charge, within ten days of the receipt of the incumbent's denial of space. An incumbent LEC must allow a requesting telecommunications carrier reasonable access to its selected collocation space during construction.

(g) An incumbent LEC that is classified as a Class A company under § 32.11 of this chapter and that is not a National Exchange Carrier Association interstate tariff participant as provided in part 69, subpart G, shall continue to provide expanded interconnection service pursuant to interstate tariff in accordance with §§ 64.1401, 64.1402, 69.121 of this chapter, and the Commission's other requirements.

(h) Upon request, an incumbent LEC must submit to the requesting carrier within ten days of the submission of the request a report describing in detail the space that is available for collocation in a particular incumbent LEC premises. This report must specify the amount of collocation space available at each requested premises, the number of collocators, and any modifications in the use of the space since the last report. This report must also include measures that the incumbent LEC is taking to make additional space available for collocation. The incumbent LEC must maintain a publicly available document, posted for viewing on the incumbent LEC's publicly available Internet site, indicating all premises that are full, and must update such a document within ten days of the date at which a premises runs out of physical collocation space.

(i) An incumbent LEC must, upon request, remove obsolete unused equipment from their premises to increase the amount of space available for collocation.

9. 47 C.F.R. § 51.701 provides:

§ 51.701 Scope of transport and termination pricing rules.

(a) The provisions of this subpart apply to reciprocal compensation for transport and termination of telecommunications traffic between LECs and other telecommunications carriers.

(b) *Telecommunications traffic.* For purposes of this subpart, telecommunications traffic means:

(1) Telecommunications traffic exchanged between a LEC and a telecommunications carrier other than a CMRS provider, except for telecommunications traffic that is interstate or intrastate exchange access, information access, or exchange services for such access (*see* FCC 01-131, paragraphs 34, 36, 39, 42-43); or

(2) Telecommunications traffic exchanged between a LEC and a CMRS provider that, at the beginning of the call, originates and terminates within the same Major Trading Area, as defined in § 24.202(a) of this chapter.

(c) *Transport.* For purposes of this subpart, transport is the transmission and any necessary tandem switching of telecommunications traffic subject to section 251(b)(5) of the Act from the interconnection point between the two carriers to the terminating carrier's end office switch that directly serves the called party, or equivalent facility provided by a carrier other than an incumbent LEC.

(d) *Termination.* For purposes of this subpart, termination is the switching of telecommunications traffic at the terminating carrier's end office switch, or equivalent facility, and delivery of such traffic to the called party's premises.

(e) *Reciprocal compensation.* For purposes of this subpart, a reciprocal compensation arrangement between two carriers is one in which each of the two carriers receives compensation from the other carrier for the transport and termination on each carrier's network facilities of telecommunications traffic that originates on the network facilities of the other carrier.

10. 47 C.F.R. pt. 36, App. A, provides in relevant part:

APPENDIX TO PART 36 – GLOSSARY

* * * * *

Central Office

A switching unit, in a telephone system which provides service to the general public, having the necessary equipment and operations arrangements for terminating and interconnecting subscriber lines and trunks or trunks only. There may be more than one central office in a building.

* * * * *

Trunks

Circuit between switchboards or other switching equipment, as distinguished from circuits which extend between central office switching equipment and information origination/termination equipment.

REPLY
BRIEF

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No. 10-313

IN THE

Supreme Court of the United States

TALK AMERICA INC.,
Petitioner,
v.
MICHIGAN BELL TELEPHONE COMPANY,
D/B/A AT&T MICHIGAN,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

REPLY BRIEF FOR PETITIONER

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Respondent.

**On Writ of Certiorari to the
United States Court of Appeals
for the Sixth Circuit**

REPLY BRIEF FOR PETITIONER

SUMMARY OF ARGUMENT

Every incumbent local exchange carrier ("ILEC") has the "duty to provide, for the facilities and equipment of any requesting telecommunications carrier, interconnection with the local exchange carrier's network." 47 U.S.C. § 251(c)(2). Interconnection is to be provided "at any technically feasible point within the carrier's network" and must be provided on a non-discriminatory basis and at rates that are just and reasonable. *Id.* The Federal Communications Commission ("FCC") in its initial rulemaking proceeding to implement the Telecommunications Act of 1996 (the "Act") interpreted the term "interconnection" to mean "the physical linking of two networks for the mutual exchange of traffic." *In re Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, First Report and Order, 11 FCC Rcd 15499, ¶ 176 (1996) ("*Local Competition Order*"). Accordingly, the FCC's implementing regulations define "interconnection" as "the linking of two networks for the mutual exchange of traffic." 47 C.F.R. § 51.5. Furthermore, the FCC's regulations provide that ILECs must provide their competitors "any technically feasible method of obtaining interconnection." *Id.* § 51.321(a). These rulings remain unchanged.

The Act imposes a separate requirement on the ILECs to provide access to the ILECs' network elements on an "unbundled basis," i.e., as unbundled network elements ("UNEs"), at any technically feasible point, on a nondiscriminatory basis, and at rates that are just and reasonable. 47 U.S.C. § 251(c)(3). Unlike the obligation to provide interconnection, the obligation to provide UNEs is constrained. Congress directed that before the FCC could require ILECs to provide a network element as a UNE under § 251(c)(3), the FCC must at a minimum determine that access to the network element is "necessary" and "the failure to provide access to such network elements would impair the ability of" the competing carrier to offer its services. 47 U.S.C. § 251(d)(2).

These obligations—to provide interconnection and to provide access to UNEs—are separate and distinct under the Act. What is common to both, however, is that interconnection facilities and UNEs are each required by the Act to be provided at cost-based rates by using Total Element Long Run Incremental Cost ("TELRIC") cost methodology. *Verizon Communications v. FCC*, 535 U.S. 467, 497 (2002).

The FCC's most recent examination of the ILECs' unbundling obligations pursuant to § 251(c)(3) removed the ILECs' obligation to provide entrance facilities as a UNE. *In re Unbundled Access to Network Elements, Review of Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Order on Remand, 20 FCC Rcd 2533, ¶ 137 (2005) ("*Triennial Review Remand Order*" *or* "*TRRO*"). But, the FCC explicitly stated that CLECs' access to entrance facilities pursuant to § 251(c)(2) was not disturbed by its unbundling conclusions. The FCC stated that:

> We note in addition that our finding of non-impairment with respect to entrance facilities does not alter the right of competitive LECs to obtain interconnection facilities pursuant to section 251(c)(2) for the transmission and routing of telephone exchange service and exchange access service. Thus, competitive LECs will have access to these facilities at cost-based rates to the extent that they require them to interconnect with the incumbent LEC's network.

Id., 20 FCC Rcd 2533, ¶ 140 (footnotes omitted).

In its underlying analysis, the FCC focused on *the use* being made of the entrance facility—in one instance the exchange of traffic with the ILEC (interconnection) and in the other the transmission of traffic that was originated by or destined for the CLEC's own customers but not exchanged with the ILEC (backhaul).[1] *In re Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Deployment of Wireline Services Offering Advanced Telecommunications Capability, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking*, 18 FCC Rcd 16978, ¶ 365 (2003), *corrected by Errata*, 18 FCC Rcd 19020 (2003) ("*TRO*").

CLECs' rights with respect to obtaining interconnection under § 251(c)(2) are absolute, in the sense that the methods of interconnection available to CLECs are limited only by technical feasibility rather than a prerequisite finding by the FCC that the "necessary and impair" standard has been satisfied for individual forms of interconnection. It is technical feasibility that Congress established as the singular "test," the "test" the FCC established in the *Local Competition Order* and the regulations adopted therein, and the "test" applied by the FCC in examining the forms of interconnection proposed by CLECs in that rulemaking and ultimately included as the minimum ways CLECs could obtain interconnection. *Local Competition* Order, 11 FCC Rcd 15499, ¶ 553 and ¶ 198; 47 C.F.R. § 51.321. The identification of this singular criterion is distinct from delineating which network elements are UNEs that Congress determined required a finding of "impairment." Congress established a very broad interconnection obligation that required no specific findings as to specific methods of interconnection, but only that a method was technically feasible.

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[1] AT&T criticizes the illustrative diagram and petitioners' and the FCC's description of backhaul (Resp. Br. 55, n.44), the wording in Talk America's brief mirrors the FCC's in the *TRO* and is not intended to be definitional. The precise nature of backhaul is not at issue here; no party is asserting that backhaul does not exist or that CLECs do not use entrance facilities for purposes of backhaul or that backhaul is not distinct from interconnection.

Because Congress has not directly spoken to the precise question at issue here—the continued availability of entrance facilities for interconnection—the FCC's interpretation in its interconnection rules must be sustained so long as it is based on a permissible construction of the statute. Although entrance facilities are not listed in 47 C.F.R. § 51.321(b), they were a pre-existing form of interconnection created by AT&T (Bell System). It is undisputed that entrance facilities had long been used by competitive long distance providers such as MCI, which were beginning to provide local service at the time the FCC established its interconnection rules. It is a reasonable interpretation of § 251(c)(2) that entrance facilities must continue to be made available to CLECs for purposes of interconnection even after they no longer need be provided as a UNE pursuant to § 251(c)(3). Under *Auer v. Robbins*, 519 U.S. 452, 464 (1997), the FCC's interpretation set out in its brief must be accorded deference.

Congress' policy objective of opening the local market to competition hinges on interconnection. None of the other requirements imposed on the ILECs by the Act is as critical as interconnection. Continuing to require ILECs to provide entrance facilities for interconnection furthers the policy of the Act.

ARGUMENT

I. Contrary to AT&T's assertions, interconnection required under § 251(c)(2) is an independent obligation; it is not constrained by the "necessary and impair" standard that limits ILECs' unbundling obligations, nor is it governed by the ILECs' obligation to transport calls under § 251(b)(5).

The FCC has consistently interpreted the interconnection obligation set out in § 251(c)(2) to be a requirement that the ILECs provide to their competitors a range of physical facilities that CLECs can use to interconnect their networks to those of the ILECs for the mutual exchange of traffic. In its first rulemaking proceeding implementing the requirements of § 251, the FCC ordered ILECs to provide various "methods of technically feasible interconnection or access" to their networks, including the provision of existing or newly built transmission facilities. *See Local Competition Order*, 11 FCC Rcd 15499, ¶ 553; 47 C.F.R. § 51.321 (requiring ILECs to provide "any technically feasible method of obtaining interconnection"). The FCC further concluded that "the term 'technically feasible' refers solely to technical or operational concerns, rather than economic, space, or site considerations" and that technically feasible as that term applied to "the obligations imposed by §§ 251(c)(2) and 251(c)(3) include[s] modifications to incumbent LEC facilities to the extent necessary to accommodate interconnection or access to network elements." *Local Competition Order*, 11 FCC Rcd 15499, ¶ 198.

AT&T does not deny that providing entrance facilities is technically feasible. AT&T, however, presents a myriad of other reasons why the FCC and petitioners are wrong that entrance facilities must be provided for interconnection purposes under § 251(c)(2) at TELRIC rates. None of AT&T's arguments survive scrutiny. Many of AT&T's arguments boil down to the same false assertion that an ILEC's interconnection obligations are subject to the same constraints and the same limitations that apply to unbundling under § 251(c)(3). Others misstate and misapply the separate statutory obligation requiring ILECs to "route and transport" CLEC traffic delivered to them, a requirement imposed on ILECs by § 251(d)(5). Yet others are simply factually wrong.[7]

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[7] AT&T states that Sprint concedes that entrance facilities used for backhaul and used for interconnection ride a single fiber-optic cable. Resp. Br. 29, n. 23. Sprint actually stated in its amicus brief that the same fiber facility can be used, with separate fiber strands designated for interconnection and for backhaul. Sprint Br. 9. In such a case, the competitor would pay for the interconnection fiber strand at TELRIC rates and it would pay for the backhaul fiber strand at a higher unregulated rate.

The amicus brief submitted by the US Telecom Association and Network Engineers adds a further, factually inaccurate reason to reject petitioners' and the FCC's position, that the ILECs cannot verify the use being made of entrance facilities. USTA Br. 29. The same argument can be made for other eligibility issues (*e.g.*, Enhanced Extended Loops ("EELs") must have a qualifying use), but that is not a valid justification to deny a competitor access to cost-based interconnection entrance facilities. ILECs are free to negotiate or arbitrate robust audit rights to verify whether a CLEC is properly accessing cost-based facilities. The traffic on entrance facilities used for interconnection by definition is exchanged with the ILEC and therefore hits the ILEC's central office switch for routing to the ILEC's customers. That traffic can be and is measured for purposes of computing the reciprocal compensation required under § 251(b)(5) of the Act.

AT&T points to the presence of the words "need" and "require" in the FCC's discussion of entrance facilities used for interconnection in the *TRO* and in paragraph 140 of the *TRRO*, and criticizes petitioners and the FCC for advocating what amounts to allowing CLECs to obtain entrance facilities simply because they "want" or "prefer" them. Resp. Br. 44. The underlying implication is that interconnection is voluntary and that CLECs could choose not to interconnect with an ILEC, and if not voluntary then CLECs should have to demonstrate that they require entrance facilities from the ILEC and cannot reasonably obtain them otherwise. That is precisely the "necessary and impair" standard for unbundling under § 251(c), a standard that is inapplicable to § 251(c)(2).[3] That AT&T is focused on the unbundling standard is clear from its reference to the FCC's finding that entrance facilities need not be provided as UNEs as justification for eliminating CLECs' right to obtain entrance facilities for interconnection.[4]

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[3] AT&T does not cite any authority for applying a threshold level of "need" to interconnection. It cites to the Court's opinion in *Verizon* (Resp. Br. 44, n.37), but the reference is misleading because the Court's analysis and the quoted language dealt exclusively with the ILECs' challenge to the FCC's combining rulings and referenced primarily § 251(c)(3). Specifically, the FCC had ruled that the ILECs must combine unbundled network elements for CLECs where the elements were located in the ILECs' central office and off limits to CLEC personnel. *Local Competition Order*, 11 FCC Rcd at 15647, ¶ 294.

[4] AT&T says that: "In fact, as the FCC found, competitors neither 'need' nor 'require' entrance facilities from incumbents at any price, because they can deploy their own entrance facilities or lease them from third parties. *See TRRO* ¶¶ 138-139, 141." Resp. Br. 45.

Similarly, AT&T argues that it cannot or should not be required to provide entrance facilities for interconnection because they are not "bottleneck" facilities. Resp. Br. 50. Again the problem with this argument is that CLECs' access to interconnection facilities under the Act is not contingent upon a finding that a "bottleneck" exists.

AT&T also asserts that only § 251(c)(3) requires ILECs to lease their facilities to CLECs (Resp. Br. 21), yet it presents a laundry list of what AT&T makes available to CLECs as leased elements and facilities for interconnection under § 251(c)(2) (Resp. Br. 28-29) and even more tellingly states that entrance facilities for interconnection would be provided as a regulated service under tariff, not at unregulated rates as Sprint and the FCC stated in their amicus briefs (Resp. Br. 53). AT&T thus expects to offer entrance facilities as a regulated service, but cites to no Michigan or federal law requiring it to do so.

All of AT&T's carefully constructed argument that it has no obligation to lease *any* facilities to CLECs under § 251(c)(2), if taken as true, leads inexorably to the conclusion that AT&T is not actually required to provide interconnection by any means that are technically feasible, but is only required to provide to CLECs something akin to a "plug-in" point. The sole exceptions would be whatever facilities the FCC determines are UNEs under § 251(c)(3).[5] The result is a perfect conflation of the requirements of

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[5] Resp. Br. 24 ("only § 251(c)(3) creates a facilities-leasing obligation; reading § 251(c)(2) to require leasing of facilities not required by § 251(c)(3) would not be 'in accordance with' the requirements of § 251")

§§ 251(c)(2) and 251(c)(3). Under AT&T's view of interconnection, once an ILEC is no longer required to lease a network element or facility as a UNE, it is not required to lease that network element or facility for interconnection either. And, if under this theory an ILEC has no obligation to provide entrance facilities for interconnection, it appears that it would be free to offer them under contract at an unregulated rate, or perhaps not at all.

AT&T's limited view of its interconnection obligations simply does not square with the language of the Act or the FCC's rulings implementing § 251(c)(2) in the *Local Competition Order*, particularly the requirement that the ILECs provide any technically feasible means of interconnection selected by a CLEC, and the FCC's explicit statement that the forms of interconnection ILECs must provide "include but are not limited to" those named in 47 C.F.R. § 51.321(b).

AT&T points to the FCC's identification of "meet point" interconnection in 47 C.F.R. § 51.321(b)(2) as "instructive" (Resp. Br. 29) and observes that no explication of entrance facilities appears in that rule or in the *Local Competition Order* (Resp. Br. 28-29). If anything, however, the FCC's affirmation that "meet point" interconnection is required by § 251(c)(2) substantiates rather than undermines petitioners' and the FCC's arguments. Interconnection cannot be a mere accommodation allowing a CLEC to "plug-in" to the ILEC's network, not even if the ILEC performs part of the work in its central office because it prohibits competitors from entering restricted areas. If the technical feasibility standard set out in § 251(c)(2) extends to requiring ILECs to build facilities to meet CLECs at a "meet point" of CLEC's selection, then surely a more modest requirement requir ing ILECs to lease existing entrance facilities to CLECs for purposes of interconnection comports with the law. The entrance facilities are not being provided solely for CLECs' benefit; by definition traffic is exchanged over these facilities, meaning that the ILECs are using these same facilities, solely paid for by the CLECs, to deliver their own traffic to the CLECs.[6]

In addition to conflating the requirements of §§ 251(c)(2) and 251(c)(3), while ignoring the FCC's pronouncements and historical experience with interconnection, AT&T argues that entrance facilities cannot be a form of interconnection because the FCC has defined interconnection as not including transport. Resp. Br. 18. AT&T distorts the FCC's conclusions. What the FCC determined in the *Local Competition Order* is that interconnection under § 251(c)(2) is distinct from the "routing and transmission" of traffic to be performed by ILECs under § 251(b)(5). The purpose of interconnection and the function performed by all interconnection facilities is "linking of two networks for the mutual exchange of traffic." *Local Competition Order*, 11 FCC Rcd 15499, ¶ 176. That physical link can be an entrance facility. AT&T uses the fact that an entrance facility is sometimes a type of transport facility to argue that it cannot be interconnection at any time. Resp. Br. 26-27. AT&T is wrong. The "routing and transport" obligation established under a separate portion of the Act, refers to the action the ILEC must take once the CLEC delivers into the ILEC's hands traffic that is destined for the ILEC's customers. In other words, the ILEC takes the "hand-off" and uses its switch to route each call and then transports each call over its network to the called party. In return for performing this function, the ILEC receives payment in accordance with the rules adopted by the FCC implementing § 251(b)(5) of the Act. CLECs have a reciprocal obligation—once the ILEC delivers calls to the CLEC that are destined for the CLEC's customers, the CLEC routes and transports each call to the called party. In both cases, the "routing and transport" function begins where the carrier receives the "hand-off," takes control of and routes the call, otherwise known as the interconnection point.

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[6] *See* Pet. Br. 34, n.12.

ILECs and CLECs have specific and different obligations under § 251(b)(5) than under § 251(c)(2). The FCC recognized the distinction in the *Local Competition Order*. The "routing and transport" of traffic is not the same as the "mutual exchange" of traffic. AT&T's arguments on this point are meritless.

II. Deference is appropriate; the FCC's statement in paragraph 140 of the *TRRO* is not a new regulation, but an affirmation of the ILECs' obligation to provide interconnection at any technically feasible point, the requirement stated in § 251(c)(2) and the regulations adopted in the *Local Competition Order*.

Where, as here, Congress has not "directly spoken" to the "precise question" at issue in a case, then reference to the underlying statute alone—even if it were clear—cannot resolve the case. *Coeur Alaska, Inc. v. Southeast Alaska Conservation Council*, __ U.S. __, 129 S.Ct. 2458, 2469 (2009), citing *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984). Instead, a reviewing court must look to the agency's regulations, which are entitled to deference if they resolve the ambiguity in a reasonable manner. *Id.* The FCC, under its broad regulatory power, interpreted the statutory requirements of the 1996 Act in numerous orders and regulations, which ultimately survived judicial scrutiny. *See, e.g., Verizon*, 535 U.S. at 538 (upholding TELRIC pricing methodology); *Covad Communications*, 450 F.3d 528, 551 (D.C. Cir. 2006) (upholding all challenged provisions of the *TRRO*). Under these circumstances, deference to the FCC's interpretation of its rulings is absolutely proper. *Auer v. Robbins*, 519 U.S. 452, 464 (1997).

This Court held that the "FCC has rulemaking authority to carry out the 'provisions of this Act,' which include Sections 251 and 252, added by the Telecommunications Act of 1996." *AT&T v. Iowa Utils. Bd.*, 525 U.S. 366, 377-378 (1999). The breadth of the FCC's regulatory expertise and authority has been repeatedly affirmed by subsequent opinions of this Court. *See, e.g., National Cable & Telecommunications Ass'n v. Brand X Internet Services*, 545 U.S. 967, 1002 (2005) (upholding FCC classification of cable modem service and noting the FCC is in a far better position to address questions concerning technical, complex, and dynamic subject matter than the courts). Hence, the FCC clearly had authority to adopt the *Local Competition Order*, establishing technical feasibility as the touchstone of the ILECs' interconnection requirements, and, subsequently, the *TRRO*, including paragraph 140. Consequently, deference is warranted because it "appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority." *United States v. Mead Corp.*, 533 U.S. 218, 226-227 (2001).

AT&T recasts the deference issue in a subtle but significant argument that if accepted by the Court would undermine the FCC's long-established rulings regarding the ILECs' interconnection obligations. Specifically, the core question raised by petitioners was "did the FCC totally eliminate the ILEC's obligation to provide entrance facilities at TELRIC rates when it ruled that entrance facilities no longer would be UNEs?" Petitioners read paragraph 140 of the *TRRO* to state that the FCC explicitly did not do so, recognizing that it was addressing unbundling under § 251(c)(3) and was not altering its prior rulings regarding interconnection under § 251(c)(2). The FCC has confirmed this reading of paragraph 140 in its brief submitted to the Sixth Circuit and in its briefs submitted here. Deference should be accorded to the FCC's interpretation of paragraph 140.

AT&T recasts the argument as if the opposite issue were before the Court, namely, "did the FCC establish entrance facilities as a form of interconnection for the first time in paragraph 140 of the *TRRO*?" Petitioner agrees that if entrance facilities were never a form of interconnection under § 251(c)(2) prior to the *TRRO*, the statement in paragraph 140 seems an unlikely way to comply with the requirements of administrative law, particularly given the FCC's express statement that it was not altering the ILECs' interconnection obligations. AT&T's effort to recast the argument sidesteps, but does not respond to, petitioners' and the FCC's arguments demonstrating that deference is appropriate in this case.

Paragraph 140 of the *TRRO* is not a new rule; it is a statement that the FCC's prior rules on interconnection were unchanged by its new decisions regarding unbundling. In arguing that it is wholly new, AT&T is asking the Court to read into both § 251(c)(2) and the FCC's implementing regulations words that are not there. Section 251(c)(2) requires the ILECs to provide "*any* technically feasible" interconnection, not "those forms of interconnection the FCC identifies as being technically feasible." (Emphasis added.) The statutory language, the *Local Competition Order* and 47 C.F.R. § 51.321 all establish an expansive regime for interconnection, not a constrictive one.[7] What is abundantly clear from the *Local Competition Order* is the FCC's conclusion that Congress intended that all technically feasible forms of interconnection were required to be made available. Precisely what forms are technically feasible was informed by the comments submitted by the parties, but nothing in the *Local Competition Order* purports to establish a "fixed and final" list.[8] Indeed, AT&T names many interconnection facilities that it offers to competitors at TELRIC pricing (Resp. Br. 5) and that are not listed in the FCC's rule. Moreover, as petitioner Talk America demonstrated in its initial brief, entrance facilities have been a recognized form of interconnection between competitors' networks and the incumbents' networks for decades.[9] Nothing in the Act eliminated interconnection through entrance facilities; instead, by requiring ILECs to provide *any* technically feasible form of interconnection, § 251(c)(2) necessarily included the form of interconnection already in existence when the Act was passed.[10]

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[7] The FCC stated that "states may impose additional requirements that differ from state to state." 11 FCC Rcd 15499, ¶ 60. In its discussion of the role of state commissions in approving interconnection agreements, the FCC said that "[s]tate commissions may identify . . . additional points at which incumbent LECs must provide interconnection, where technically feasible." 11 FCC Rcd 15499, ¶ 136.

[8] The Administrative Law Professors ignore the plain language of § 251(c)(2) that requires interconnection at any technically feasible point, a requirement analyzed at length by the FCC in its *Local Competition Order* and embodied in both 47 C.F.R. 51.321(a) and (b). The amici state that the only possible regulation the FCC could have been interpreting was 47 C.F.R. 51.321(b), and conclude that because two examples of interconnection are set out in that rule, adding a third was tantamount to amending the rule. Admin. Law Br. 15. These amici ignore the longstanding existence of entrance facilities as interconnection facilities, even predating the FCC's rule.

The requirement to provide entrance facilities as interconnection facilities is not a "new mandate []" (Resp. Br. 38), requiring the formalities of notice and comment rulemaking. It was an existing mandate and the FCC affirmed in paragraph 140 that it had not changed. The FCC's position is entitled to *Auer* deference.

III. Competition cannot exist without interconnection; the FCC's determination that Congress meant what it said in § 251(c)(2)—that CLECs have a right to interconnect in any technically feasible manner—furthers the policy objectives of the Act.

If any concept embodied in the Act is obvious and immutable, it is that competition cannot exist if a market entrant cannot interconnect with the incumbent so that the customers the newcomer wins can place calls to and receive calls from the incumbent's customers. All of the other requirements imposed on the ILECs that are intended to enable CLECs to compete—access to UNEs, the ability to collocate, the right to attach to ILECs' poles, the ability of customers to port their telephone numbers when changing carriers—would be superfluous if the ILECs could prevent or restrict interconnection or, as AT&T appears to be arguing, that the FCC must first make a specific finding that a CLEC was impaired without access to a particular method of interconnection. It is no surprise then that Congress required the ILECs not just to *allow* competitors to "plug in" at whatever location and in whatever way the ILECs designated, but to *enable* competitors to interconnect and exchange traffic in any technically feasible manner. Congress made the policy choice to place no precondition, other than technical feasibility, on the way in which CLECs would interconnect to the ILECs' networks.

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[9] Pet. Br. 17-21.

[10] Congress is presumed to have been aware of the FCC's actions enabling competition to arise with respect to long distance service and interconnection through entrance facilities. *See Lorillard v. Pons*, 434 U.S. 575, 580-581 (1978).

This Court has recognized the great difficulty competitors would face in attracting customers absent interconnection. *Verizon*, 535 U.S. at 490, n.11 ("a mininetwork connecting only some of the users in the local exchange would be of minimal value to customers"). This Court also has recognized the broad interconnection obligation that applies to ILECs even when the competitive carrier is a pure facilities-based carrier.[11]

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[11] Sprint is such a carrier. Sprint explained the need for interconnection and for entrance facilities provided by the ILECs in its amicus brief supporting petitioners.

> Section 251(c) addresses the practical difficulties of fostering local competition by recognizing three strategies that a potential competitor may pursue. First, a competitor entering the market . . . may decide to engage in pure facilities-based competition, that is, to build its own network to replace or supplement the network of the incumbent. If an entrant takes this course, the Act obligates the incumbent to "interconnect" the competitor's facilities to its own network to whatever extent is necessary to allow the competitor's facilities to operate. §§ 251(a) and (c)(2).

Verizon, 535 U.S. at 491.

AT&T nonetheless argues for a contrary view, a hyper-restrictive interpretation of both § 251(c)(2) and the FCC's implementing regulations. AT&T contends that because entrance facilities are not "bottleneck facilities" there is no policy reason to require ILECs to provide them at TELRIC rates (Resp. Br. 19), rates that AT&T disparages as being "just above the confiscatory level" (Resp. Br. 4) and "artificially low" (Resp. Br. 19).[12] In making this

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[12] In upholding the FCC's decision to require cost-based rates to be determined using TELRIC methodology, this Court observed that:

> Within the discretion left to it after eliminating any dependence on a "rate-of-return or other rate-based proceeding," the Commission chose a way of treating "cost" as "forward-looking economic cost," 47 CFR § 51.505 (1997), something distinct from the kind of historically based cost generally relied upon in valuing a rate base after *Hope Natural Gas*. In Rule 505, the FCC defined the "forward-looking economic cost of an element [as] the sum of (1) the total element long-run incremental cost of the element [TELRIC]; [and] (2) a reasonable allocation of forward-looking common costs," § 51.505(a), common costs being

argument, AT&T is once again attempting to engraft the "necessary and impair" limitation that applies to UNEs under § 251(c)(3) onto § 251(c)(2) where no such limitation exists. Nothing in § 251(c)(2) remotely suggests that the ILECs' interconnection obligation is dependent upon a threshold of level of need for a specific method of interconnection. AT&T's reliance on the Seventh Circuit's opinion in *Illinois Bell v. Box*, 548 F.3d 607, 609 (7th Cir. 2008) as support for this engrafting is misplaced. The court in *Box* used the phrase "bottleneck facilities" in its decision addressing only § 251(c)(3) network elements. The opinion does not address interconnection facilities provided under § 251(c)(2).

AT&T's related policy argument is that the market opening purposes of § 251(c)(2) have been achieved. Competition, technology, and networks are fluid, not static, however. New providers of local telecommunications services continue to enter the marketplace even as existing competitors are acquired by the ILECs,[13] merge with other CLECs,[14] or fail.[15] Even

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> "costs incurred in providing a group of elements that "cannot be attributed directly to individual elements," § 51.505(c)(1). Most important of all, the FCC decided that the TELRIC "should be measured based on the use of the most efficient telecommunications technology currently available and the lowest cost network configuration, given the existing location of the incumbent['s] wire centers." § 51.505(b)(1).

Verizon, 535 U.S. at 495.

[13] For example, SBC Communications, Inc., the ultimate parent of Michigan Bell, acquired AT&T Corp. resulting in the current AT&T, Inc., in November 2005; Verizon Communications, Inc. acquired MCI, Inc. in January 2006; and Windstream Corporation acquired NuVox, Inc. in February 2010. All of these CLECs were operational at the time the *TRRO* was issued

the explosive growth of wireless communication, and the presence of wireless competition referenced by AT&T (Resp. Br. 48) is a form of competition that is less robust than it would at first appear. AT&T and Verizon are by far the largest wireless carriers, together having approximately 60% of both subscribers and revenue; Sprint and T-Mobile are the next largest in size but are significantly smaller.[16] And, AT&T has announced its plans to acquire ownership of T-Mobile.[17] A policy in which it is technical feasibility, not the ebbs and flows in the scope of competition, that determines where and how the all-important right to interconnect will be implemented is a policy that over time serves the country well. It is the policy Congress established and it is the policy the FCC's regulations further when they require ILECs to provide entrance facilities for purposes of interconnection. AT&T may wish Congress put

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and, indeed, were active participants in both the *TRO* and *TRRO* proceedings. *See TRRO* at 138, 139, 140

[14] PAETEC Holdings, Inc., for example, acquired Talk America Inc. in a merger that closed on December 6, 2010.

[15] The bursting of the dot-com bubble in 2000 saw a number of local service providers cease to exist, including e.spire Communications (March 2001), Winstar Communications Inc. (April 2001), Teligent, Inc. (May 2001), and Metromedia Fiber Networks (May 2002).

[16] Fourteenth Report at 6. *Annual Report and Analysis of Competitive Market Conditions with Respect to Mobile Wireless, Including Commercial Mobile Services*, WT Docket No. 09-66, FCC 10-81.

[17] Deutsche Telekom will "hand over" 100% ownership of T-Mobile USA to AT&T; Deutsche Telekom will get approximately $25 billion in cash and take an approximately 8% stake in AT&T. T-Mobile Press Release, Mar. 20, 2011. http://newsroom.t-mobile.com/articles/att-acquires-tmobile-USA.

preconditions into § 251(c)(2) or an expiration date on its mandate once some level of competition emerged. Neither is in the statute, however.

AT&T objection to a requirement that it continue to provide entrance facilities at TELRIC rates is rooted in its opposition to TELRIC as a cost methodology. Resp. Br. 51. According to AT&T, TELRIC pricing for interconnection is leading competitors to opt to use the ILECs' facilities when the purpose of the statute is to stimulate facilities-based competition. Resp. Br. 50-51.[18] AT&T argues that the goal of the Act is not just to stimulate competition but to encourage facilities-based competition and that facilities-based competitors have no need to use the ILEC's network either as UNEs or as interconnection. Resp. Br. 50-51. The Act establishes a spectrum of ways that competitors can enter the market and serve their customers, however.[19] Moreover, the Act does not mandate that carriers achieve total reliance on only their own (or non-ILEC) facilities within any period of time.

Despite AT&T's disdain for TELRIC pricing, this cost methodology for interconnection facilities, including entrance facilities, has not lead to a lack of facilities-based competitors, or prevented competitors from constructing and using their own facilities for interconnection. If TELRIC rates were so low that they did not recover costs and provide a reasonable profit, other carriers would not have found it possible to build such facilities as they transition to becoming facilities-based.

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[18] Ironically, AT&T and other ILECs strenuously opposed the FCC's decision to require the use of TELRIC methodology to set rates for interconnection and for UNEs on the grounds that they would not spur the growth of facilities-based competition. *Verizon*, 535 U.S. at 503-504.

[19] *Verizon*, 535 U.S. at 491.

AT&T nonetheless argues that requiring ILECs to provide entrance facilities at TELRIC is "anticompetitive" because CLECs will have no incentive to locate their switches in close proximity to the ILEC, thus imposing uncontrolled costs on the ILEC for facility construction. Resp. Br. 51.[26] As a practical matter, a CLEC requires interconnection to a number of carriers, including smaller ILECs serving nearby areas, long distance carriers and wireless carriers. Competitors historically have found it beneficial to locate in proximity to many carriers, making it unlikely that a CLEC would select a location for its central office that is deliberately far from the ILEC's nearest central office, since doing so would also increase the distance to other carriers.

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[26] AT&T criticizes the MPSC's Order for its lack of a limitation on new facility construction (Resp. Br. 51), ignoring the fact that the arbitration conducted by the MPSC was a "baseball style" arbitration in which the MPSC chose between the participating CLECs' proposed language that mirrored paragraph 140 of the *TRRO* and AT&T's counter proposal, which only recognized CLECs' right to interconnect with AT&T's network pursuant to the Act for the exchange of traffic. AT&T offered no alternative language embodying any limitation on the pricing, the component parts, the length, or the conditions for the ordering, provision, or use of interconnection entrance facilities. The MPSC thus was required to choose between adopting language that matched what was contained in the *TRRO*, or rejecting that language entirely.

Moreover, states have authority to impose reasonable limits on the ILEC's interconnection obligations and to enable the ILEC to recover extra costs incurred to fulfill a CLEC's interconnection request. In the *Local Competition Order*, the FCC specifically delegated to state commissions the authority to decide the appropriate distance for a proposed meet-point interconnection, and stated that a CLEC requesting technically feasible but expensive interconnection would bear costs, including paying a higher, cost-based rate. 11 FCC Rcd 15499, ¶ 162, ¶ 198, ¶ 200, ¶ 209, and ¶ 553. The FCC, acting in the stead of the Virginia Corporation Commission as arbitrator of an interconnection agreement, declined to require Verizon to build new entrance facilities sought by a CLEC. *In re Petition of WorldCom, Inc., Pursuant to Section 252(e)(5) of the Communications Act for Preemption of the Jurisdiction of the Virginia Corporation Commission Regarding Interconnection Disputes With Verizon Virginia Inc., and for Expedited Arbitration*, Memorandum and Order, 17 FCC Rcd 27039, ¶ 134 (2002).

In any event, at issue here is the requirement for the ILEC to provide existing entrance facilities at TELRIC rates, not construct new facilities for interconnection.

There is no policy reason for rejecting the FCC's interpretation of paragraph 140 of the *TRRO*.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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March 23, 2011

AMICUS
CURIAE
BRIEF

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Nos. 10-313 and 10-329

In the Supreme Court of the United States

TALK AMERICA, INCORPORATED, PETITIONER

v.

MICHIGAN BELL TELEPHONE COMPANY, DBA
AT&T MICHIGAN

OKJHAKOR ISIOGU, ET AL., PETITIONERS

v.

MICHIGAN BELL TELEPHONE COMPANY, DBA
AT&T MICHIGAN

*ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT*

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

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QUESTION PRESENTED

Under 47 U.S.C. 251(c)(2), an incumbent local exchange carrier must "provide * * * interconnection" at cost-based rates to a requesting competitive local exchange carrier "at any technically feasible point within the [incumbent] carrier's network." An "entrance facility" is a transmission facility owned by an incumbent carrier that connects its network to that of a competitive carrier. The question presented is as follows:

Whether an incumbent must make an entrance facility available at cost-based rates when a competitive carrier seeks to use such a facility for interconnection.

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

INTEREST OF THE UNITED STATES

These cases present the question whether an incumbent local exchange carrier must provide "entrance facilities" to a competitive local exchange carrier at cost-based rates under the Communications Act of 1934, 47 U.S.C. 151 *et seq.*, as amended by the Telecommunications Act of 1996 (1996 Act), Pub. L. No. 104-104, 110 Stat. 56. The Federal Communications Commission (FCC or Commission) has rulemaking authority under the Communications Act, see 47 U.S.C. 201(b), and it has adopted several orders addressing the regulatory treatment of entrance facilities. The United States therefore has a significant interest in the resolution of the question presented. In the court of appeals, the FCC filed a brief as an amicus curiae at the invitation of the court.

STATEMENT

1. The 1996 Act "fundamentally restructure[d] local telephone markets" in order to "end[] the longstanding regime of state-sanctioned monopolies" and open those markets to competition. *AT&T Corp.* v. *Iowa Utils. Bd.*, 525 U.S. 366, 371 (1999). Congress recognized that prospective competitors faced significant barriers to entering markets that were dominated by the pre-existing monopolists—incumbent local exchange carriers (incumbent LECs or ILECs). To aid new entrants in overcoming those barriers, Congress enacted 47 U.S.C. 251(c). That provision enables competitive carriers to enter local markets by using the incumbents' networks in distinct but overlapping ways, two of which are relevant here.

First, Section 251(c)(2) requires incumbent LECs to "provide * * * interconnection" between their networks and the networks of competitive LECs (CLECs). 47 U.S.C. 251(c)(2). Interconnection is "the physical linking of two networks for the mutual exchange of traffic." *Implementation of the Local Competition Provisions in the Telecomms. Act of 1996*, 11 F.C.C.R. 15,499, 15,590 ¶ 176 (1996) (subsequent history omitted) (*Local Competition Order*); see 47 C.F.R. 51.5. Such linking enables customers of a competitive LEC to call the incumbent's customers, and vice versa. The absence of such interconnection would disadvantage the competitive LEC, whose customers would be unable to call (or receive calls from) the incumbent's much larger customer base.[1]

Section 251(c)(2) requires an incumbent LEC to provide interconnection to a requesting competitive carrier "at any technically feasible point within the [incumbent] carrier's network." 47 U.S.C. 251(c)(2)(B); see 47 C.F.R. 51.305. Recognizing the important role that interconnection plays in fostering local telephone competition, the FCC has directed that incumbents must provide competitors "any technically feasible method of obtaining interconnection * * * at a particular point upon a request." 47 C.F.R. 51.321(a); see *Local Competition Order*, 11 F.C.C.R. at 15,780-15,781 ¶ 553. Those methods "include, but are not limited to," "[p]hysical collocation," under which a competitive LEC installs its switching equipment in an incumbent's central office; "virtual collocation," under which an incumbent installs and maintains equipment in its central office for a competitor; and "[m]eet point interconnection arrangements," under which an incumbent and a competitor both build out their facilities to meet the other's. 47 C.F.R.

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[1] Interconnection "does not include the transport and termination of traffic." 47 C.F.R. 51.5. Instead, compensation for transport and termination—that is, for delivering local telephone calls that are placed by the customer of another carrier—is governed by separate provisions in the 1996 Act. 47 U.S.C. 251(b)(5), 252(d)(2). Typically, a competitive LEC will pay an incumbent a cost-based rate for interconnection under Section 251(c)(2) and, in addition, will separately pay a cost-based rate to terminate local telecommunications traffic that travels from the competitor to the incumbent over the facilities the competitor has leased for interconnection.

51.321(b); see 47 C.F.R. 51.5; *Local Competition Order*, 11 F.C.C.R. at 15,779-15,781 ¶¶ 549-553.

Second, Section 251(c)(3) separately requires incumbent LECs to lease certain "network elements" to competitors "on an unbundled basis." 47 U.S.C. 251(c)(3); see *Verizon Commc'ns Inc.* v. *FCC*, 535 U.S. 467, 531 (2002) ("To provide a network element 'on an unbundled basis' is to lease the element, however described, to a requesting carrier at a stated price specific to that element."). That requirement gives competitors the right to lease parts of an incumbent's network, enabling them to "compete with the incumbent carrier to provide local service" without having to incur the expense of "replicating the incumbent's entire existing network." *Id.* at 490. Before a competitive LEC is entitled to lease an unbundled network element, however, the FCC must determine that lack of access to that element would "impair" the competitor's "ability * * * to provide the services that it seeks to offer" to its customers. 47 U.S.C. 251(d)(2)(B); see *AT&T Corp.*, 525 U.S. at 387-392.

The 1996 Act provides that rates for both interconnection and unbundled network elements must be cost-based and may include a reasonable profit. 47 U.S.C. 252(d)(1).[2] It also establishes procedures that incumbents and their competitors must follow when implementing Section 251(c)'s interconnection and unbundling obligations. Carriers may voluntarily negotiate contracts ("interconnection agreements"), but if negotiations fail, disputed issues are referred to state commissions for mandatory arbitration. 47 U.S.C. 252(a)-(e). The decisions of state commissions are subject to review in federal district court. 47 U.S.C. 252(e)(6); see *Verizon Md. Inc.* v. *Public Serv. Comm'n*, 535 U.S. 635, 641-644 (2002).

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[2] The Commission's rules prescribe a methodology for calculating those rates that is known as "total element long-run incremental cost" (TELRIC). See 47 C.F.R. 51.505(b). This Court has upheld that methodology as lawful and consistent with the statute. *Verizon Commc'ns Inc.*, 535 U.S. at 501-523.

2. This case concerns the proper regulatory treatment of "entrance facilities"—transmission facilities (typically wires or cables) that are owned by incumbent LECs and "that connect competitive LEC networks with incumbent LEC networks." *Unbundled Access to Network Elements*, 20 F.C.C.R. 2533, 2609-2610 ¶¶ 136-137 (2005) (*Triennial Review Remand Order* or *TRRO*) (reprinted at Pet. App. 155a-158a),[3] aff'd, *Covad Commc'ns Co.* v. *FCC*, 450 F.3d 528 (D.C. Cir. 2006). Entrance facilities have two distinct principal uses. First, a competitor can use an entrance facility to interconnect its equipment with the incumbent's equipment, so that calls can move back and forth between customers on the two networks. For example, when a competitor's customer calls the incumbent's customer, the call might travel through the competitor's switch and then over the entrance facility to the incumbent's switch, so that the incumbent can route the call to the appropriate destination on its network.

Second, a competitor can use an entrance facility to transport traffic between points on its own network. For example, a competitor might use an entrance facility to carry a call from one of its customers to its own switching equipment collocated at the incumbent's office, so that the call can then be routed to another customer of the competitor. Using an incumbent's entrance facility in that manner is known as "backhauling." *See Pacific Bell Tel. Co.* v. *California Pub. Utils. Comm'n*, 621 F.3d 836, 842 (9th Cir. 2010) (diagram illustrating the use of an entrance facility for interconnection and backhauling), petition for cert. pending, No. 10-838 (filed Dec. 23, 2010).[4]

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[3] All references to "Pet. App." are to the appendix to the petition for a writ of certiorari in No. 10-329.

In 2003, the FCC adopted the *Triennial Review Order* (*TRO*), in which it determined that entrance facilities are "facilities that exist *outside* the incumbent LEC's local network" and therefore are not network elements that can be subject to mandatory unbundling under Section 251(c)(3). *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 18 F.C.C.R. 16,978, 17,203 ¶ 366, vacated in part, *United States Telecom Ass'n* v. *FCC*, 359 F.3d 554 (D.C. Cir.), cert. denied, 543 U.S. 925 (2004) (*USTA*). The Commission recognized that "[c]ompetitive LECs use these transmission connections between incumbent LEC networks and their own networks both for interconnection and to backhaul traffic," and it explained that "[u]nlike the facilities that incumbent LECs explicitly must make available for section 251(c)(2) interconnection, the Act does not require incumbent LECs to unbundle transmission facilities connecting incumbent LEC networks to competitive LEC networks for the purpose of backhauling traffic." *Id.* at 17,203 ¶ 365 (footnote omitted). At the same time, the Commission emphasized that, "to the extent that requesting carriers need facilities in order to 'interconnect[] with the [incumbent LEC's] network,' section 251(c)(2) of the Act expressly provides for this and we do not alter the Commission's interpretation of this obligation." *Id.* at 17,204 ¶ 366 (quoting 47 U.S.C. 251(c)(2)) (brackets in original).

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[4] As respondent points out (Br. in Opp. 25 n.28), some courts have used imprecise language to describe backhauling. Backhauling is not limited to calls that originate and terminate with a competitive LEC's customers. Instead, it occurs whenever a competitive LEC uses an entrance facility for a purpose other than interconnection with an incumbent. For example, backhauling occurs when a competitive LEC leases an incumbent's entrance facility to transport a call originated by one of its customers to a customer served by a wireless provider with which the competitive LEC has interconnected. For purposes of this case, however, the precise definition of backhauling is not relevant. Rather, the crucial point is that the Commission's orders have treated entrance facilities differently based on whether the facilities are being used for interconnection or for backhauling.

The D.C. Circuit granted petitions for review of the FCC's order and rejected the Commission's finding that entrance facilities are not "network elements" for purposes of Section 251(c)(3). *USTA*, 359 F.3d at 585. Noting that the statute defines the term "network element" as "'a facility [or] equipment used in the provision of a telecommunications service,'" the court concluded that "the Commission's reasoning appears to have little or no footing in the statutory definition," and it remanded for further consideration. *Id.* at 585-586 (quoting 47 U.S.C. 153(29)). The court did not address the FCC's conclusion that Sections 251(c)(2) and 251(c)(3) impose distinct statutory obligations on an incumbent's provision of entrance facilities.

On remand, the FCC adopted the *Triennial Review Remand Order*, in which it found, contrary to its earlier conclusion, that entrance facilities are within the incumbent's network and therefore are correctly classified as "network elements." *TRRO*, 20 F.C.C.R. at 2609-2610 ¶¶ 136-137.[5] Based on the "economic characteristics of entrance facilities," however, the agency determined that competitive carriers are not impaired in their ability to provide service without unbundled access to entrance facilities. *Id.* at 2610 ¶ 138. Accordingly, the Commission adopted a regulation specifying that Section 251(c)(3) does not obligate incumbents to provide competitors with access to entrance facilities on an unbundled basis. 47 C.F.R. 51.319(e)(2)(i) ("*Entrance facilities.* An incumbent LEC is not obligated to provide a requesting carrier with unbundled access to dedicated transport that does not connect a pair of incumbent LEC wire centers."). As it had in the *Triennial Review Order*, however, the FCC emphasized that its "finding of non-impairment with respect to entrance facilities does not alter the right of competitive LECs to obtain interconnection facilities pursuant to section 251(c)(2)." *TRRO*, 20 F.C.C.R. at 2611 ¶ 140. "[C]ompetitive LECs," the agency explained, "will have access to these facilities at cost-based rates to the extent that they require them to interconnect with the incumbent LEC's network." *Ibid.*

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[5] Specifically, the *Triennial Review Remand Order* "reinstate[d] the *Local Competition Order* definition of dedicated transport to the extent

3. Respondent is an incumbent LEC in Michigan. Shortly after the FCC issued the *Triennial Review Remand Order*, respondent notified competitive LECs that it would no longer provide entrance facilities at a cost

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that it included entrance facilities." 20 F.C.C.R. at 2610 ¶ 137. The FCC explained that, in the *Local Competition Order*, it had defined dedicated transport as "incumbent LEC transmission facilities dedicated to a particular customer or carrier that provide telecommunications between wire centers owned by incumbent LECs or requesting telecommunications carriers." *Id.* at 2609 ¶ 136 (citing *Local Competition Order*, 11 F.C.C.R. at 15,718 ¶ 440). Thus, according to the *Triennial Review Remand Order*, an entrance facility is dedicated transport, defined as an "incumbent LEC transmission facilit[y]," or a facility that by definition is part of the incumbent's network.

based rate, but instead would require competitive LECs to pay a higher rate if they wished to continue using such facilities. Pet. App. 8a. Various competitive LECs complained to the Michigan Public Service Commission that respondent's action unlawfully abrogated their right to cost-based interconnection under Section 251(c)(2). *Id.* at 98a-100a. The Michigan commission arbitrated the dispute in favor of the competitive LECs. *Id.* at 100a. Relying on the *Triennial Review Remand Order*, it concluded that competitive LECs "still have a right to entrance facilities to the extent required for interconnection pursuant to Section 251(c)(2)." *Ibid.*

4. Respondent challenged the Michigan commission's ruling in federal district court, and the district court vacated the ruling. Pet. App. 54a-82a. The court construed the *Triennial Review Remand Order* to reflect a conclusion by the FCC that "entrance facilities need not be provided by incumbent carriers to competing carriers on an unbundled basis." *Id.* at 70a. The court acknowledged the FCC's statement that its determination with respect to unbundling did not alter incumbents' distinct interconnection obligation. *Ibid.* The court held, however, that "[i]t is not reasonable to interpret an explanatory comment, such as the one found in ¶ 140 of the *TRRO*, in a manner that undermines the plain meaning of the rule"—*i.e.*, 47 C.F.R. 51.319(e)(2)(i). Pet. App. 70a.

5. The Michigan commission and several competitive LECs appealed. At the invitation of the court of appeals, the FCC filed an amicus brief urging the court to reverse the district court's decision. The Commission emphasized its statements in Paragraph 140 of the *Triennial Review Remand Order* "that its rule relieving incumbent LECs of the duty to unbundle entrance facili-

ties and its non-impairment finding 'do[] not alter the right of competitive LECs to obtain interconnection facilities pursuant to section 251(c)(2),'" and "that 'competitive LECs will have access to these facilities at cost-based rates to the extent that they require them to interconnect with the incumbent LEC's network.'" FCC C.A. Br. 10-11 (quoting *TRRO*, 20 F.C.C.R. at 2611 ¶ 140) (brackets in original). The FCC argued that the Michigan commission "was correct in accepting the agency's authoritative interpretation of the scope of the unbundling rule and its specification of the incumbent LECs' section 251(c)(2) obligations." *Id.* at 11.

6. The court of appeals affirmed. Pet. App. 1a-51a.

a. The court of appeals construed Section 251(c)(2)'s directive that an incumbent LEC shall "provide * * * interconnection with" its network as requiring the incumbent only to "'make a plug-in available' *for* connection with the CLEC's facilities and equipment," not "to 'lease a physical facility (or wire) *to* the CLEC.'" Pet. App. 33a. The court drew a distinction between an "entrance facility" and an "interconnection facility," which it understood to be a separate facility that allows a competitor to "plug into" an incumbent's network at "the ILEC's designated connection point." *Id.* at 37a. The court stated that an incumbent "has no obligation to provide any entrance facility." *Id.* at 38a (emphasis omitted). Instead, it believed that the "most plausible reading of the plain language of the *TRRO* is that the ILEC must allow the CLEC to connect its network to the ILEC's network, and may not charge the CLEC more than [cost-based] rates for this connection." *Id.* at 37a. The court concluded that "the link * * * between the ILEC's designated connection point and the ILEC's network" does not constitute an interconnection facility, and therefore need not be made available at cost-based rates, unless "the ILEC requires the CLEC to connect at some point other than directly into its network." *Ibid.* In so holding, the court rejected the FCC's understanding of the *Triennial Review Remand Order* as "so plainly erroneous" that the court could "only conclude that the FCC has attempted to create a new *de facto* regulation under the guise of interpreting the regulation." *Id.* at 11a n.6.

The court of appeals acknowledged that its decision conflicted with decisions of the Seventh and Eighth Circuits. Pet. App. 33a-37a. Those circuits (and the Ninth Circuit, in a subsequent decision) have construed Paragraph 140 of the *Triennial Review Remand Order*, in which the FCC referred to the "right of competitive LECs to obtain interconnection facilities pursuant to section 251(c)(2)," 20 F.C.C.R. at 2611, to mean that incumbent LECs "must allow the use of entrance facilities for interconnection" at cost-based rates, *Illinois Bell Tel. Co.* v. *Box*, 526 F.3d 1069, 1072 (7th Cir. 2008); accord *Southwestern Bell Tel., L.P.* v. *Missouri Pub. Serv. Comm'n*, 530 F.3d 676, 683-684 (8th Cir. 2008), cert. denied, 129 S. Ct. 971 (2009); *Pacific Bell*, 621 F.3d at 843-847. The court of appeals found the Seventh and Eighth Circuit decisions unpersuasive, however, because it understood them as "assuming the very question to be decided"—namely, that "interconnection facilities" and "entrance facilities" are the same thing. Pet. App. 33a.

b. Judge Sutton dissented. Pet. App. 39a-51a. He observed that the majority's view of the FCC's order and rules "may be a reasonable interpretation," but he argued that "[s]o too * * * is the FCC's competing interpretation, one premised on an interpretation of its own regulations and one that we must respect as a result." *Id.* at 39a. "In the final analysis," Judge Sutton concluded, "the FCC's interpretation reasonably respects the words of its regulations and [*Auer* v. *Robbins*, 519 U.S. 452 (1997)] requires us to respect that interpretation." *Id.* at 51a.

SUMMARY OF ARGUMENT

In 47 U.S.C. 251(c)(2) and (3), Congress adopted two distinct mechanisms to promote competition in local telephone markets. Section 251(c)(2) requires incumbent carriers to provide interconnection to their competitors at cost-based rates, making it possible for the customers of a competitive carrier to call (and receive calls from) an incumbent's larger customer base. Separately, Section 251(c)(3) requires incumbents to provide certain network elements on an unbundled basis, thus enabling competitors to assemble their own telecommunications networks by combining elements from various sources, including incumbents' networks.

When it adopted the *Triennial Review Remand Order*, 20 F.C.C.R. 2533 (2005), the FCC concluded that incumbents would not be required to make entrance facilities available to their competitors as unbundled network elements under Section 251(c)(3). In the same order, however, the Commission stated that its determination did "not alter the right of competitive LECs to obtain interconnection facilities pursuant to section 251(c)(2)," and that "competitive LECs will have access to these facilities at cost-based rates to the extent that they require them to interconnect with the incumbent LEC's network." *Id.* at 2611 ¶ 140. Under the *Triennial Review Remand Order*, an incumbent must make entrance facilities available to a competitor at cost-based rates when the competitor seeks to use those facilities to interconnect with the incumbent's network. In reaching a contrary conclusion, the court of appeals committed three fundamental errors.

First, the court of appeals failed to appreciate that the FCC's orders treat the same facilities differently depending on the purpose for which they are used. The *Triennial Review Remand Order* makes clear that an incumbent is not categorically obligated to make entrance facilities available at cost-based rates. Rather, that obligation exists only when entrance facilities are being used as "interconnection facilities." The court of appeals misconstrued the term "interconnection facilities," as used in the Commission's order, to refer to facilities *different from* entrance facilities. In fact, that term simply refers to entrance facilities that are being used for interconnection.

Second, the court of appeals erroneously limited the scope of incumbent carriers' statutory duty to permit interconnection. The court concluded that an incumbent's only interconnection duty is to allow a competitor to "plug in" to its network, and that the incumbent may unilaterally designate the point at which interconnection will occur. That view cannot be reconciled with Section 251(c)(2)(B), which permits the requesting competitive carrier to select "any technically feasible" method and point of interconnection. And, to the extent that the statutory language is ambiguous, the FCC has long construed Section 251(c)(2) to give the competitive carrier, rather than the incumbent, the right to choose among "technically feasible" interconnection points.

Third, the court of appeals conflated the independent obligations imposed on incumbents by Sections 251(c)(2) and (3). Adopting an overly expansive reading of the FCC regulation relieving incumbents from an obligation to make entrance facilities available as unbundled network elements under Section 251(c)(3), the court erroneously concluded that incumbents have no obligation to make such facilities available for interconnection under Section 251(c)(2).

Each of the court of appeals' errors is traceable in part to the court's failure to give adequate weight to the FCC's reasonable interpretation of the statutes it administers and of its own orders. Because the FCC's interpretation is reasonable, it is entitled to deference under *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837 (1984), and *Auer* v. *Robbins*, 519 U.S. 452 (1997). The court of appeals gave no sound reason for declining to defer to the views expressed in the FCC's amicus brief below, which was submitted at the court's own request. But in any event, the government's brief in *this* Court is entitled to deference under clearly established principles.

ARGUMENT

WHEN A COMPETITIVE LOCAL EXCHANGE CARRIER SEEKS TO USE AN ENTRANCE FACILITY FOR INTERCONNECTION, 47 U.S.C. 251(c)(2) REQUIRES AN INCUMBENT TO LEASE THE FACILITY AT A COST-BASED RATE

Under 47 U.S.C. 251(c)(2), an incumbent local exchange carrier has a "duty to provide" a competitive carrier with "interconnection with the [incumbent's] network," at cost-based rates, "at any technically feasible point within the [incumbent's] network." An FCC regulation implements that provision by directing incumbents to provide competitors with "any technically feasible method of obtaining interconnection * * * at a particular point upon a request." 47 C.F.R. 51.321(a). The issue in this case is whether an entrance facility—a link owned by an incumbent that connects its network to the network of a competitor—must be made available at cost-based rates when the competitor seeks to use it for interconnection. The court of appeals held that no such obligation exists. The effect of the court's ruling is that, even when a competitor seeks to use an entrance facility for interconnection, an incumbent carrier may require as a condition of the lease that the competitor pay a higher, unregulated rate.

In reaching that conclusion, the court of appeals committed a series of errors. The court failed to appreciate that the FCC's orders treat the same facilities differently depending on the purpose for which they are used; it adopted an unduly narrow understanding of the incumbent's statutory obligation to permit interconnection; and it confused the interconnection obligation under Section 251(c)(2) with the unbundling obligation under Section 251(c)(3). At each step of its analysis, moreover, the court erred in failing to afford deference to the Commission's reasonable construction of the statutes it administers and the orders it has adopted.

A. Under The FCC's Orders, Entrance Facilities Must Be Made Available For Interconnection At Cost-Based Rates Even Though They Need Not Be Made Available At Cost-Based Rates For Other Purposes

The FCC has established different rules for competitors' access to an incumbent LEC's entrance facilities depending on how the competitor seeks to use those facilities. Under the *Triennial Review Remand Order*, 20 F.C.C.R. 2533 (2005), an incumbent's entrance facilities are available to competitors as "interconnection facilities" if used for interconnection, even though the same facilities need not be made available for use in backhauling as unbundled network elements under Section 251(c)(3). The court of appeals' misunderstanding of the *Triennial Review Remand Order* rests in part on the court's mistaken view that "interconnection facilities and entrance facilities are different things." Pet. App. 32a n.13. In fact, the FCC's orders use the term "interconnection facility" to refer to an entrance facility that is being used for interconnection, not to a distinct type of facility.

1. In the *Triennial Review Order*, 18 F.C.C.R. 16,978 (2003), the FCC made clear that the regulatory treatment of entrance facilities depends on the purpose for which those facilities are used. The agency explained that "[c]ompetitive LECs use these transmission connections between incumbent LEC networks and their own networks both for interconnection and to backhaul traffic," and it determined that "the Act does not require incumbent LECs to unbundle transmission facilities connecting incumbent LEC networks to competitive LEC networks for the purpose of backhauling traffic." *Id.* at 17,203 ¶ 365. The agency made clear, however, that "to the extent that requesting carriers need facilities in order to 'interconnect[] with the [incumbent LEC's] network,' section 251(c)(2) of the Act expressly provides for this and we do not alter the Commission's interpretation of this obligation." *Id.* at 17,204 ¶ 366 (quoting 47 U.S.C. 251(c)(2)) (brackets in original).

When the FCC revisited the treatment of entrance facilities in the *Triennial Review Remand Order*, it did not alter incumbents' Section 251(c)(2) obligation to provide such facilities at cost-based rates for the purpose of interconnection. The agency relied on the "economic characteristics of entrance facilities" to determine that competitors would not be impaired in their ability to provide service if they lacked unbundled access to such facilities, and it therefore declined to order unbundling under Section 251(c)(3). 20 F.C.C.R. at 2610 ¶ 138. The FCC emphasized, however, that under Section 251(c)(2), incumbents remain subject to an independent duty to make entrance facilities available at cost-based rates when competitors seek to use them for interconnection. Specifically, in Paragraph 140 of the *Triennial Review Remand Order*, the FCC stated:

> We note in addition that our finding of non-impairment with respect to entrance facilities does not alter the right of competitive LECs to obtain interconnection facilities pursuant to section 251(c)(2) for the transmission and routing of telephone exchange service and exchange access service. Thus, competitive LECs will have access to these facilities at cost-based rates to the extent they require them to interconnect with the incumbent LEC's network.

Id. at 2611 ¶ 140 (footnote omitted).

Although the *Triennial Review Remand Order* did not expressly distinguish between backhauling and interconnection, the agency had no need to draw that contrast because the order, by its terms, did not "alter" the usage-based distinctions set out in the earlier *Triennial Review Order*. *TRRO*, 20 F.C.C.R. at 2611 ¶ 140. And although the D.C. Circuit had vacated the *Triennial Review Order* in its *USTA* decision, the court had addressed only the FCC's conclusion that entrance facilities could not be "network elements" for purposes of Section 251(c)(3). As the Ninth Circuit has correctly recognized, the court in *USTA* "did not rule on the validity of the FCC's conclusion that, under § 251(c)(2), incumbent LECs are obligated to offer entrance facilities at [cost-based] rates." *Pacific Bell Tel. Co.* v. *California Pub. Utils. Comm'n*, 621 F.3d 836, 846 n.15 (2010), petition for cert. pending, No. 10-838 (filed Dec. 23, 2010); see *MAP Mobile Commc'ns, Inc.* v. *Illinois Bell Tel. Co.*, 24 F.C.C.R. 5582, 5592 ¶ 30 (Enforcement Bureau 2009) (explaining that the discussion of entrance facilities in the *Triennial Review Order*, "which was remanded on appeal, involved unbundling obligations * * *, not charges for interconnection") (footnote omitted).

Accordingly, entrance facilities are "interconnection facilities," as that term is used in the *Triennial Review Remand Order*, when they are being used for interconnection. Under Section 251(c)(2), "competitive LECs will have access to these facilities at cost-based rates to the extent they require them to interconnect with the incumbent LEC's network." *TRRO*, 20 F.C.C.R. at 2611 ¶ 140.

2. In concluding that entrance facilities should not be available as unbundled network elements when used to backhaul traffic, but should remain available for interconnection at cost-based rates when used as a competitive LEC's physical link with the incumbent's network for the mutual exchange of traffic, the *Triennial Review Order* and *Triennial Review Remand Order* were consistent with well-established FCC precedent. The Commission has long recognized that a single facility can be used for different functions, and that its regulatory treatment can vary depending on the use to which it is put. Indeed, the agency's regulations implementing Sections 251(c)(2) and 251(c)(3) frequently make such usage-based distinctions.

In other provisions of the *Triennial Review Remand Order*, for example, the FCC prohibited the use of unbundled network elements "for the exclusive provision of mobile wireless services or interexchange [*i.e.*, long-distance] services." 47 C.F.R. 51.309(b); see *TRRO*, 20 F.C.C.R. at 2551-2558 ¶¶ 34-40. At the same time, the agency permitted "[a] requesting telecommunications carrier that accesses and uses an unbundled network element consistent with" that restriction to "provide any telecommunications services over the same unbundled network element." 47 C.F.R. 51.309(d). Thus, as with entrance facilities, the FCC's rules regulate access to network elements based on use: A competitive LEC may use an unbundled network element to provide local telephone service, even though the competitor may not use the same facility exclusively to provide long distance or mobile wireless services.

Similarly, 47 C.F.R. 51.305(b) prohibits a competitive LEC from requesting interconnection under Section 251(c)(2) "solely for the purpose of originating or terminating its interexchange traffic [*i.e.*, long distance traffic] on an incumbent LEC's network and not for the purpose of providing to others telephone exchange service [*i.e.*, local telephone service], exchange access service [*i.e.*, network access], or both." Although "the same exact wire" could be used for both purposes, Pet. App. 29a, the FCC's rule prohibits the use of the interconnection arrangement for terminating long distance traffic, but permits its use to offer local telephone service. In upholding that aspect of the FCC's rules, the Eighth Circuit noted that "[o]bviously the services sought, while they might be technologically identical (a question beyond our expertise), are distinct." *Competitive Telecomms. Ass'n* v. *FCC*, 177 F.3d 1068, 1073 (1997) (*CompTel*). Section 51.305(b) confirms that the court below was wrong in asserting that "neither the FCC nor any court has ever defined interconnection" in terms of "a particular use of" a facility. Pet. App. 32a.

3. The court of appeals misread Paragraph 140 of the *Triennial Review Remand Order* because it believed that the FCC could not have "used two separate terms—'entrance facility' and 'interconnection facility'—to describe the exact same wire." Pet. App. 29a. The court therefore concluded that "interconnection facilities and entrance facilities are different things," and that the *Triennial Review Order*'s emphasis on the distinction between backhauling and interconnection was intended to "describe and differentiate two types of *facilities* for which [the FCC] had not yet established names." *Id.* at 32a n.13. Contrary to the court of appeals' understanding, both orders make clear that the FCC regulates a single category of facilities—entrance facilities—based on how those facilities are being used.

If (as the court of appeals believed) interconnection facilities were categorically different from entrance facilities, the FCC would have had no reason to discuss interconnection facilities—or to underscore incumbents' continuing obligation to provide them—in Paragraph 140 of the *Triennial Review Remand Order*, which appears in a section of the order entitled "Entrance Facilities." 20 F.C.C.R. at 2609; see *Pacific Bell*, 621 F.3d at 845 (noting that the relevant section of the *Triennial Review Remand Order* "solely discusses the effect of the FCC's finding as to entrance facilities"). Moreover, if incumbents had no obligation to provide entrance facilities at cost-based rates under either Section 251(c)(2) or Section 251(c)(3), regardless of the manner in which entrance facilities are used, there would have been no reason for the agency to distinguish between entrance facilities being used for interconnection and those being used for backhauling. Yet the Commission did draw such a usage-based distinction. See *TRO*, 18 F.C.C.R. at 17,202-17,204 ¶¶ 365-366. As Judge Sutton explained in his dissent below, "[t]hese points of emphasis make little sense if entrance facilities never function as § 251(c)(2) interconnection facilities." Pet. App. 47a.

B. Section 251(c)(2) Requires An Incumbent To Provide Interconnection At The Point And By The Method Requested By The Competitor Unless It Is Technically Infeasible To Do So

The court of appeals' decision appears to reflect the view that Section 251(c)(2) and the *Triennial Review Remand Order* require an incumbent to do nothing more than "make a plug-in available" for a competitor to connect to its network. Pet. App. 33a; see *id.* at 23a-26a (analogizing an "interconnection facility" to "an electrical outlet in your garage" and an entrance facility to "one of those big orange extension cords"). The court also read the *Triennial Review Remand Order* to allow the incumbent to determine unilaterally where interconnection will take place. *Id.* at 37a-38a. In both respects, the court misinterpreted Section 251(c)(2) and the FCC order.

1. Section 251(c)(2) requires an incumbent "to provide * * * interconnection" to a requesting competitor "at any technically feasible point within the carrier's network." 47 U.S.C. 251(c)(2). Since the enactment of the 1996 Act, the FCC has consistently construed that provision to mean that an incumbent may be required to provide facilities to a competitor in order to link the two carriers' networks. As the Commission explained in its 1996 *Local Competition Order*, "Congress intended to obligate the incumbent to accommodate the new en-

trant's network architecture by requiring the incumbent to provide interconnection 'for the facilities and equipment' of the new entrant." 11 F.C.C.R. 15,499, 15,605 ¶ 202. The agency recognized that "incumbent LEC networks were not designed to accommodate third-party interconnection or use of network elements at all or even most points within the network." *Ibid.* As a result, "[i]f incumbent LECs were not required, at least to some extent, to adapt their facilities to interconnection or use by other carriers, the purposes of sections 251(c)(2) and 251(c)(3) would often be frustrated." *Ibid.* In light of the technical limitations of incumbents' existing networks, the FCC found that vindicating the rights of competitors to obtain interconnection at any technically feasible point could require "novel use of" and "modification to" incumbents' facilities—for which the competitors would pay the incumbents' costs plus a reasonable profit. *Ibid.* The *Local Competition Order* and the implementing rule it adopted therefore require an incumbent to provide interconnection not just at any feasible point, but by "any technically feasible method." 47 C.F.R. 51.321(a) and (b).[6]

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[6] The FCC's interconnection rules, which were adopted in 1996, do not expressly require incumbents to provide entrance facilities to satisfy their interconnection obligations under Section 251(c)(2). That is because, until 2003—when the FCC eliminated unbundled access to entrance facilities in the *Triennial Review Order*—a competitive LEC typically would elect to order a cost-priced entrance facility under Section 251(c)(3) since an unbundled network element can be used more expansively than the same facility provided solely for interconnection under Section 251(c)(2). See *Local Competition Order*, 11 F.C.C.R. at 15,636-15,637 ¶ 270 ("Subsection (c)(3) * * * allows unbundled elements to be used for a broader range of services than subsection (c)(2) allows for interconnection."); *TRO*, 18 F.C.C.R. at 17,203 ¶ 365 n.1113 (same). Only after the FCC eliminated access to entrance facilities as

Once the *Triennial Review Remand Order* reestablished that entrance facilities are part of the incumbent's network, the governing standard under Section 251(c)(2) became whether providing competitive LECs access to those entrance facilities for interconnection is technically feasible. 47 U.S.C. 251(c)(2)(B); see *Local Competition Order*, 11 F.C.C.R. at 15,602-15,607 ¶¶ 198-206. Respondent has not disputed that the feasibility standard is satisfied here. As the Seventh Circuit has observed, an entrance facility "meets the requirement of feasibility" because it is "designed for the very purpose of linking two carriers' networks." *Illinois Bell Tel. Co.* v. *Box*, 526 F.3d 1069, 1072 (2008); see *Pacific Bell*, 621 F.3d at 844; *Southwestern Bell Tel., L.P.* v. *Missouri Pub. Serv. Comm'n*, 530 F.3d 676, 681 (8th Cir. 2008), cert. denied, 129 S. Ct. 971 (2009).

2. The court of appeals erred in holding that Section 251(c)(2) never obligates an incumbent "to lease a physical facility (or wire) *to* the" competitive LEC. Pet. App. 33a (internal quotation marks omitted). To the contrary, the FCC and the courts have consistently interpreted Section 251(c)(2) to require incumbents to provide a range of facilities to allow interconnection—including, in some circumstances, constructing new facilities where none already exist. See, *e.g.*, *CompTel*, 117 F.3d at 1071-1072 (affirming FCC's interpretation of Section 251(c)(2) as requiring an incumbent LEC to provide "a physical link, between the equipment of the carrier seeking interconnection and the LEC's network"); *US West Commc'ns, Inc.* v. *Minnesota Pub. Utils. Comm'n*, 55

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unbundled network elements did it have occasion to clarify, in the *Triennial Review Order* and the *Triennial Review Remand Order*, that Section 251(c)(2) gives competitive LECs a right of access to such facilities for interconnection at cost-based rates.

F. Supp. 2d 968, 982-983 (D. Minn. 1999) (affirming state commission order requiring incumbent to provide existing transmission facilities or build new ones to comply with Section 251(c)(2)); cf. *AT&T Corp.* v. *FCC*, 317 F.3d 227, 234-235 (D.C. Cir. 2003).

In the *Local Competition Order*, for example, the FCC determined that a "meet-point arrangement" is one of many "methods of technically feasible interconnection or access to incumbent LEC networks." 11 F.C.C.R. at 15,780-15,781 ¶ 553; see 47 C.F.R. 51.321(b). Meet-point arrangements require an incumbent to build a transmission facility from its network to a designated meet point with a competitor "for the mutual exchange of traffic." *Local Competition Order*, 11 F.C.C.R. at 15,781 ¶ 553; see 47 C.F.R. 51.5. "[E]ach party" to such an arrangement "pays its portion of the costs to build out the facilities to the meet point," a negotiated point between each carrier's respective network. *Local Competition Order*, 11 F.C.C.R. at 15,781 ¶ 553. In its discussion of interconnection through "meet point[s]," the FCC explained that "the limited build-out of facilities" from the incumbent's network "constitute[s] an accommodation of interconnection." *Ibid.* Recognizing that "the creation of meet point arrangements may require some build out of facilities by the incumbent," the FCC nonetheless found "that such arrangements are within the scope of the obligations imposed by section[ ] 251(c)(2)." *Ibid.*

When compared with that requirement, which has been implemented successfully throughout the telephone industry, the obligation to make entrance facilities available for interconnection is a modest one. A meet-point arrangement requires an incumbent to build a new segment of a dedicated transport facility at its own expense in order to interconnect with a competitor.

In those circumstances, it receives no interconnection compensation from the competitor. By comparison, under the *Triennial Review Remand Order*'s interpretation of Section 251(c)(2), an incumbent is only required to lease to a competitor, at a cost-based rate, an existing facility that is already part of its network.[7]

3. The court of appeals also erred in holding that an incumbent may choose whether to treat a facility as an entrance facility or an interconnection facility. See Pet. App. 47a (Sutton, J., dissenting). According to the court, "[i]f the ILEC requires the CLEC to connect at some point other than directly into its network, then the link * * * between the ILEC's designated connection point and the ILEC's network is * * * an 'interconnection facility' and the ILEC may charge only [cost-based] rates for the use of that * * * interconnection facility." *Id.* at 37a. By contrast, the court stated that "[a]ny facility * * * outside of the ILEC's designated connection point * * * is *not* itself an 'interconnection facility'; it is an 'entrance facility'" that the ILEC "most assuredly has *no obligation to provide*." *Id.* at 37a-38a. The apparent premise of the court of appeals' analysis

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[7] This case involves existing facilities that respondent leased to competitive LECs as unbundled network elements under Section 251(c)(3) before the *Triennial Review Remand Order* was adopted. Pet. App. 8a (explaining that respondent "had been charging CLECs regulated [cost-based] rates for use of * * * entrance facilities" until, "in light of the *TRRO*, [respondent] decided it would henceforth charge higher (*i.e.*, competitive) rates for the entrance facilities it was providing"). The FCC has not ruled on whether an incumbent has a duty under Section 251(c)(2) to build new entrance facilities for a competitor's use. In 2002, however, the agency's staff declined to require an incumbent to "bear[] the cost of building new facilities all the way to [a competitor's] central office location." *In re WorldCom, Inc.*, 17 F.C.C.R. 27,039, 27,109 ¶134 (Wireline Competition Bureau).

is that an incumbent carrier can satisfy its obligation to provide interconnection "at any technically feasible point within the carrier's network," 47 U.S.C. 251(c)(2)(B), by designating a single "technically feasible" point of interconnection, even if it refuses a competitive carrier's request for interconnection at a different point that is also "technically feasible."

That analysis is inconsistent with the text of Section 251(c)(2). If Congress had intended to limit the scope of the interconnection obligation in the manner the court of appeals contemplated, it could have required an incumbent carrier to provide interconnection upon request "at *a* technically feasible point." By instead requiring the incumbent carrier to provide requesting competitors with interconnection "at *any* technically feasible point within the [incumbent] carrier's network," 47 U.S.C. 251(c)(2)(B) (emphasis added), Congress conferred upon requesting carriers the right to choose among technically feasible points of interconnection.

To the extent that the statutory language is ambiguous, the FCC's rules clearly reflect the understanding that the incumbent must provide interconnection at the point in its network chosen by the competitor unless interconnection at that point is technically infeasible. See 47 C.F.R 51.305(e) ("An incumbent LEC that denies a request for interconnection at a particular point must prove to the state commission that interconnection at that point is not technically feasible."). With respect to the choice among potential *methods* of interconnection, the FCC's rules similarly provide that "[a]n incumbent LEC that denies a request for a particular method of obtaining interconnection * * * on the incumbent LEC's network must prove to the state commission that the requested method of obtaining interconnection

* * * is not technically feasible." 47 C.F.R. 51.321(d); see *Local Competition Order*, 11 F.C.C.R. at 15,602, 15,605-15,606 ¶¶ 198, 203, 205. The court of appeals' reading of Section 251(c)(2) and the *Triennial Review Remand Order* cannot be reconciled with that long-standing regulatory approach.

By reading the *Triennial Review Remand Order* to permit an incumbent to determine unilaterally how and where competitive LECs may interconnect, the court of appeals effectively rewrote the interconnection regime established by Congress in the 1996 Act and implemented by the FCC thereafter. The text of the statute and years of Commission precedent make clear that the incumbent must make available at cost-based rates both the method and the point of interconnection requested by the competitive LEC, unless the incumbent can demonstrate that the request is technically infeasible.

C. An Incumbent's Interconnection Obligation Under Section 251(c)(2) Is Independent Of Its Unbundling Obligation Under Section 251(c)(3)

The court of appeals perceived a conflict between 47 C.F.R. 51.319(e)(2)(i), which eliminates unbundled access to entrance facilities under Section 251(c)(3), and the FCC's statement in the *Triennial Review Remand Order* that entrance facilities must be offered at cost-based rates when they are being used for interconnection under Section 251(c)(2). Section 51.319(e)(2)(i) states that "[a]n incumbent LEC is not obligated to provide a requesting carrier with unbundled access to dedicated transport that does not connect a pair of incumbent LEC wire centers." 47 C.F.R. 51.319(e)(2)(i). The court read that provision to establish a categorical rule that an incumbent "is not obligated to provide entrance facilities at [cost-based] rates," and it therefore concluded that an incumbent "can charge competitive rates for the use of its entrance facilities." Pet. App. 16a; see *id.* at 29a n.12. The court's analysis was flawed.

1. As the FCC made clear in Paragraph 140 of the *Triennial Review Remand Order*, Sections 251(c)(2) and 251(c)(3) impose separate and independent obligations on incumbent LECs. 20 F.C.C.R. at 2611. Although the *Triennial Review Order* and the *Triennial Review Remand Order* amended the unbundling rules, they did nothing to alter the FCC's longstanding interconnection rules. Indeed, as Judge Sutton pointed out, "[i]t would be surprising * * * if the *TRRO* exempted entrance facilities from the pre-existing obligations" in the FCC's interconnection rules "through a novel analysis without comment." Pet. App. 45a.

After explaining the FCC's conclusion that entrance facilities are part of the incumbent's network and therefore fall within the statutory definition of a "network element," the section of the *Triennial Review Remand Order* addressing entrance facilities analyzed whether competitors would be "impair[ed]" without unbundled access to those facilities. 20 F.C.C.R. at 2610-2611 ¶¶ 138-139. Under 47 U.S.C. 251(d)(2), the FCC must make an impairment determination when deciding whether network elements should be classified as unbundled network elements that an incumbent must provide under Section 251(c)(3). No impairment analysis is required, however, in determining an incumbent's interconnection duty under Section 251(c)(2). The *Triennial Review Remand Order*'s discussion of impairment therefore would have been irrelevant to an analysis of an incumbent's interconnection obligations. See *Illinois Bell*, 526 F.3d at 1072 (explaining that the determination whether an ILEC must charge cost-based rates for interconnection "is not related to the scope of the ILEC's obligations under § 251(c)(3) to furnish unbundled network elements"); accord *Pacific Bell*, 621 F.3d at 844; *Southwestern Bell*, 530 F.3d at 683-684.

Respondent suggests (Br. in Opp. 26) that the FCC's interpretation of Section 251(c)(2) is inconsistent with the Commission's finding, in the course of its impairment analysis under Section 251(c)(3), that "competing LECs do *not* require [cost-based] entrance facilities." As explained above, however, although the statute generally requires an impairment showing for cost-based access to network elements, the duty to provide interconnection at cost-based rates exists so long as interconnection at a particular point is "technically feasible." 47 U.S.C. 251(c)(2)(B). Under Section 251(c)(2), an incumbent carrier's duty to provide interconnection at cost-based rates does not depend on whether the competitive LEC "require[s]" interconnection or would be impaired in its ability to provide service if interconnection were unavailable.

2. Like Paragraph 140 of the *Triennial Review Remand Order*, 20 F.C.C.R. at 2611, the rules promulgated in that order discuss only an incumbent's unbundling obligations, not its duty to provide interconnection. Section 51.319(e)(2)(i), the rule cited by the court of appeals, states that, "in accordance with section 251(c)(3)," 47 C.F.R. 51.319(e), an incumbent "is not obligated to provide a requesting carrier with unbundled access" to entrance facilities, 47 C.F.R. 51.319(e)(2)(i). Nothing in Section 51.319(e)(2)(i) suggests that the rule also applies to an incumbent's separate obligation—embodied in a different rule, codified at 47 C.F.R. 51.305—to provide interconnection under Section 251(c)(2). Accordingly,

the court of appeals erred in holding that Section 51.319(e)(2)(i) "could be rewritten as: an ILEC is not obligated to provide entrance facilities at [cost-based] rates." Pet. App. 16a. As Judge Sutton explained, the court's attempt to rewrite the rule "turns the phrase 'with unbundled access' into a useless appendage." *Id.* at 46a. Properly construed, Section 51.319(e)(2)(i) is not relevant to the interconnection question presented in this case.

D. The FCC's Interpretation Of Section 251(c)(2), And Of Its Own Orders And Rules, Is Entitled To Deference

1. Congress did not directly address the question whether, or under what circumstances, an incumbent's duty to provide "interconnection" under Section 251(c)(2) includes an obligation to provide entrance facilities used to link its network with the network of a competitor. By leaving the term "interconnection" undefined, Congress conferred upon the FCC significant discretion to delineate the scope of an incumbent's interconnection obligation. See 47 U.S.C. 201(b) (authorizing the FCC to "prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this chapter"). The Commission's interpretation of Section 251(c)(2) is therefore entitled to deference under *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837, 842-845 (1984). See *National Cable & Telecomms. Ass'n* v. *Brand X Internet Servs.*, 545 U.S. 967, 980 (2005).

2. To the extent that the FCC orders at issue in this case are themselves ambiguous, the agency's authoritative interpretation of those orders is also entitled to deference. *Auer* v. *Robbins*, 519 U.S. 452, 461 (1997); *Bowles* v. *Seminole Rock & Sand Co.*, 325 U.S. 410, 413-414 (1945). The court of appeals erred in failing to defer

to the interpretation set out in the FCC's amicus brief below. In any event, the amicus brief for the United States filed in this Court reflects the FCC's considered interpretation of its own rules and orders, and it is entitled to deference under established administrative-law principles.

The court of appeals suggested that the agency's interpretation of the *Triennial Review Remand Order* is not entitled to deference because the order is an "interpretive rule" rather than a "true regulation." Pet. App. 11a, n.6 (internal quotation marks omitted). That is incorrect. The FCC conducted a notice-and-comment rulemaking before it adopted the order. *TRRO*, 20 F.C.C.R. at 2543-2545 ¶¶ 18-19. The order itself contained seven pages of new rules, including the version of 47 C.F.R. 51.319(e)(2)(i) on which the court below relied. 20 F.C.C.R. at 2667 ¶ 239; *id.* at 2677 (App. B), and the agency published a summary of it in the "Rules and Regulations" section of the Federal Register, 70 Fed. Reg. 8940 (2005). As Judge Sutton observed, "[a]ll of this confirms that the *TRRO* is a legislative rule." Pet. App. 50a. The fact that the *Triennial Review Remand Order* was denominated an "order" rather than a "rule" does not alter the deference analysis because the FCC's rulemaking "orders" are legislative acts of the agency. See *Central Tex. Tel. Coop., Inc.* v. *FCC*, 402 F.3d 205, 211 (D.C. Cir. 2005) ("Although the APA defines 'order' as a final disposition other than in a rulemaking, * * * the Commission uses the designation 'order' even when it issues legislative rules after overt § 553 rulemaking."). In any event, it is well settled that an "agency's interpretation of its own precedent," no less than its interpretation of its regulations, "is entitled to deference." *Boca Airport, Inc.* v. *FAA*, 389 F.3d 185, 190 (D.C. Cir. 2004) (quoting *Cassell* v. *FCC*, 154 F.3d 478, 483 (D.C. Cir. 1998)).

The court of appeals also erred in declining (Pet. App. 10a n.6) to give deference to the amicus brief filed by the FCC below. This Court has repeatedly deferred to agency interpretations set forth in briefs and in agency staff memoranda. See, *e.g.*, *Chase Bank USA, N.A.* v. *McCoy*, No. 09-329 (Jan. 24, 2011), slip op. 15 ("Under *Auer*, * * * it is clear that deference to the interpretation in the Board's *amicus* brief is warranted."); *Auer*, 519 U.S. at 462 ("Petitioners complain that the Secretary's interpretation comes to us in the form of a legal brief; but that does not, in the circumstances of this case, make it unworthy of deference."); see also *Ford Motor Credit Co.* v. *Milhollin*, 444 U.S. 555, 566 n.9 (1980). Like an amicus brief filed in this Court, the FCC's Sixth Circuit amicus brief should be assumed to "reflect the agency's fair and considered judgment on the matter in question." *Auer*, 519 U.S. at 462; see Pet. App. 48a (Sutton, J., dissenting) ("A deference doctrine that turns on whether a brief was filed in the United States Supreme Court or a court of appeals has little to commend it."). The court's unwillingness to treat that brief as an authoritative statement of the agency's position was particularly unwarranted because the brief was "filed *at the request* of [the] court of appeals." *Id.* at 49a; see *id.* at 48a-49a (explaining that the Sixth Circuit "called for the views of the FCC in order to understand how the agency construed its regulations and to make sure [the court was] not missing something in the process"). In any event, the government's amicus brief in *this* Court is entitled to deference under established administrative-law principles, see *Chase Bank*, slip op. 12-13, regardless of what weight should have been given to the brief filed below.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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AMICUS CURIAE BRIEF

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IN THE

Supreme Court of the United States

TALK AMERICA INC.

Petitioner,

v.

MICHIGAN BELL TELEPHONE COMPANY
D/B/A AT&T MICHIGAN,

Respondent.

ORJIAKOR N. ISIOGU, MONICA MARTINEZ, AND
GREG R. WHITE, COMMISSIONERS OF THE MICHIGAN
PUBLIC SERVICE COMMISSION,

Petitioners,

v.

MICHIGAN BELL TELEPHONE COMPANY
D/B/A AT&T MICHIGAN,

Respondent.

On Writs of Certiorari to the United States Court of Appeals for the Sixth Circuit

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INTEREST OF *AMICI CURIAE*[1]

Amici are law professors who teach, research, and write in the areas of federal administrative law and procedure. They teach, research, and write about many of the issues in this case, including the proper scope of deference to agencies' interpretations of the statutes and regulations that govern agency conduct. *Amici* submit this brief to demonstrate that the proper scope of deference to administrative statutory and regulatory interpretations should exclude the government's claims for deference in this case.

Michael J. Burstein is a Climenko Fellow and Lecturer on Law at Harvard Law School. He has written on administrative law and telecommunications.[2]

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amici* represent that no counsel for a party authored this brief in whole or in part and that none of the parties or their counsel, nor any other person or entity other than *amici* or their counsel, made a monetary contribution intended to fund the preparation or submission of this brief. Counsel for *amici* also represent that all parties have consented to the filing of this brief, and letters reflecting their consent have been filed with the Clerk.

[2] While previously in private practice, Mr. Burstein was on the briefs for AT&T California in *Pacific Bell Telephone Co. v. California Public Utilities Commission*, 621 F.3d 836 (9th Cir. 2010). That representation ended before the court of appeals heard argument in the case.

INTRODUCTION AND SUMMARY

This case concerns the proper regulatory treatment of "entrance facilities" under the Telecommunications Act of 1996 and the Federal Communications Commission's implementing regulations and orders. "Entrance facilities" are cables used to transmit telecommunications traffic between the networks of two different carriers – an incumbent local exchange carrier (LEC) and a competitive LEC. *See* 47 C.F.R. § 51.319(e)(2)(i). The court below held that incumbent LECs are under no duty to provide entrance facilities to competitive LECs at regulated prices known as "TELRIC" rates. *See* Pet. App. 31a-33a.

The court below and the parties offer comprehensive treatments of the regulatory background. *See, e.g.*, Pet. App. 2a-8a; Gov't Br. 2-8; AT&T Br. 2-11. As relevant here, the Act imposes two separate duties on incumbent LECs to facilitate entry by competitive LECs.[3] Under § 251(c)(2) of the Act, the duty at issue here, incumbent LECs must "provide, for the facilities and equipment of any requesting [competitive LEC], interconnection with the [incumbent LEC's] network" at a "technically feasible point within" that network. 47 U.S.C. § 251(c)(2). Under § 251(c)(3), incumbent LECs must "provide, to any requesting [competitive LEC] . . . access to [certain] network elements on an unbundled basis." *Id.* § 251(c)(3). Shortly after the Act's passage, the Commission promulgated regulations implementing those two sections. Those regulations were the subject of extensive litigation over many years in the courts. *See* Pet. App. 3a-5a.[4] Nevertheless, from the Commission's initial rulemaking until its adoption of the *Triennial Review Order*[5] in 2003, the Commission took the position that entrance facilities needed to be provided on an unbundled basis under § 251(c)(3). The Commission reversed course in the *Triennial Review Order* and later adhered to that position, albeit with different reasoning that could withstand judicial review, in the 2005 *Triennial Review Remand Order*.[6]

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[3] The Act also imposes on incumbent LECs the duty to "offer for resale at wholesale rates any telecommunications service that the [incumbent LEC] provides at retail," 47 U.S.C. § 251(c)(4), but that duty is not at issue in this case.

The question presented in this case is whether incumbents must nevertheless provide entrance facilities to competitors under the separate interconnection duty in § 251(c)(2) of the Act. Prior to this and similar litigation, the Commission had never expressly taken the position that § 251(c)(2) or the Commission's regulations implementing that section required incumbents to provide entrance facilities to competitors. *See* Gov't Br. 22 n.6. Yet in this case, petitioners and the United States ask the Court to give deference to the government's new construction of the Act, the Commission's implementing regulations, and the *Triennial Review* orders. Such deference is inappropriate. The Court has consistently declined to allow agencies to rely on deference doctrines to avoid using formal procedures like notice-and-comment rulemaking when making substantive rules. Each of the government's three possible bases for deference here constitutes just such an end-run around established administrative procedures.

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[4] References to "Pet. App." are to the appendix to the petition for a writ of certiorari filed by Talk America in No. 10-313.

[5] Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 18 FCC Rcd. 16978 (2003) ("*Triennial Review Order*" or "*TRO*").

[6] Order on Remand, *Unbundled Access to Network Elements; Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 20 FCC Rcd. 2533 (2005) ("*Triennial Review Remand Order*" or "*TRRO*").

First, the government's position that incumbent LECs must provide competitive LECs with entrance facilities for interconnection under § 251(c)(2) is not eligible for *Chevron* deference because the Commission's statements that purport to articulate that obligation do not have the force of law. *See United States v. Mead Corp.*, 533 U.S. 218, 230-32 (2001). Although those statements are found in the *Triennial Review* orders – documents that were the products of notice-and-comment rulemakings – the statements were not themselves subject to that process. The Commission never put any party on notice that it was considering amending its interconnection regulations, never actually amended those regulations, never solicited comments about the question whether incumbent LECs have a duty to provide entrance facilities under § 251(c)(2), and gave no indication that any party needed to petition for review of a new interpretation of § 251(c)(2). On the contrary, the agency in each order said that it was "not alter[ing]" its prior interpretation of § 251(c)(2). *See TRO* ¶ 366; *TRRO* ¶ 140. Granting *Chevron* deference to an interpretation rendered under such circumstances would allow an agency to bypass notice-and-comment procedures by simply tacking its desired statutory interpretations onto the products of unrelated rulemaking proceedings. The Court should not endorse such a rule.

Second, the government cannot reasonably claim that the statements in the *Triennial Review* orders represent an interpretation of the existing interconnection regulations eligible for deference under *Auer v. Robbins*, 519 U.S. 452 (1997). The Commission's purported rule would constitute an *amendment* of those regulations, not an interpretation. The relevant regulation, 47 C.F.R. § 51.321, articulates a general requirement – that incumbent LECs provide "any technically feasible method of obtaining interconnection," *id.* § 51.321(a) – followed by a specification of two such methods, *id.* § 51.321(b). Well-established principles of administrative law require the Commission to act through notice-and-comment rulemaking to add a third. This Court should not allow the agency to avoid that procedural duty through deference.

Third, the government's interpretations of the *Triennial Review* orders in this litigation do not qualify for *Auer* deference because they do not reflect the agency's "fair and considered" judgment about the meaning of its orders. *Auer*, 519 U.S. at 462. The government makes no attempt to grapple with alternative – and more plausible – readings of the few sentences that it claims impose an obligation on incumbent LECs to provide entrance facilities under § 251(c)(2). The government must undertake a more complete explanation – preferably through rulemaking – of its orders in order to avoid "unfair surprise" to the regulated parties. *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 170 (2007).

ARGUMENT

I. *CHEVRON* DEFERENCE TO THE FCC'S INTERPRETATION OF SECTION 251(c)(2) IS NOT WARRANTED

In its brief in this Court, the government contends that § 251(c)(2) "includes an obligation [on AT&T's

part] to provide entrance facilities" to competing carriers at cost-based rates upon request. Gov't Br. 30. That interpretation is not eligible for deference under the doctrine of *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984). The Commission did not render its statutory interpretations under "circumstances reasonably suggesting that Congress ever thought . . . deserving [of] the deference claimed for them." *Mead*, 533 U.S. at 231.

A. *Chevron* Deference Applies Only To Agency Interpretations Made In Accordance With Congressionally-Delegated Authority To Act With The Force Of Law.

In *Chevron*, this Court held that "ambiguities in statutes within an agency's jurisdiction to administer are delegations of authority to the agency to fill the statutory gap in reasonable fashion." *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 980 (2005) (citing *Chevron*, 467 U.S. at 865-66). But not all agency interpretations are entitled to deference from the Court. In *Mead*, the Court held that an agency's interpretation of a statute qualifies for deference only "when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority." 533 U.S. at 226-27; *see also Christensen v. Harris Cnty.*, 529 U.S. 576, 587-88 (2000).

Underlying *Mead's* restriction of the scope of *Chevron* deference are two related concerns. First, the Court will only defer to an agency's interpretation of an ambiguous statute when it is clear that Congress has granted the agency "the authority to promulgate binding legal rules." *Brand X*, 545 U.S. at 980-81; *see also Mead*, 533 U.S. at 230-31 & n.11; Thomas W. Merrill & Kristin E. Hickman, *Chevron's Domain*, 89 Geo. L.J. 833, 871-72 (2001). Congress must have delegated to the agency primary interpretive authority over the statute. The procedures that Congress instructs an agency to use furnish one indication that such a delegation has occurred. *See, e.g.*, *Mead*, 533 U.S. at 230 ("It is fair to assume generally that Congress contemplates administrative action with the effect of law when it provides for a relatively formal administrative procedure.").

An agency exercising its delegated interpretive authority, however, must still do so through administrative procedures designed to produce rules with the force of law. In *Mead* itself, for example, the Court observed that the Customs Service had a "general rulemaking power" by which it could make regulations with the force of law. 533 U.S. at 232. But the interpretations contained in classification rulings promulgated outside that power were not entitled to deference. The Court found it "difficult . . . to see *in the agency practice itself* any indication that [the agency] ever set out with a lawmaking pretense in mind" when it made the interpretations. *Id.* at 233 (emphasis added). Those interpretations were not themselves subject to the rigors of notice and comment, were of limited precedential value, and were issued with little deliberation. *See id.* at 233-34.

In short, administrative interpretations only have the force of law – only are eligible for deference – when they reflect "the fairness and deliberation that should underlie a pronouncement of such force." *Id.* at 230; *see also* Lisa Schultz Bressman, *Beyond Accountability: Arbitrariness and Legitimacy in the*

Administrative State, 78 N.Y.U. L. Rev. 461, 538 (2003) ("Agencies may possess only so much authority (1) as Congress may grant them, and (2) as they may exercise consistent with the value of fairness, rationality, and predictability.").

Although the Court may draw some inferences about the fairness and deliberation with which an agency has rendered an interpretation — and, therefore, the interpretation's authority — from the formality of the procedures the agency employed, the Court has repeatedly noted that the inquiry does not end there. Interpretations found in relatively informal pronouncements such as "opinion letters," "policy statements, agency manuals, and enforcement guidelines" usually are ineligible for *Chevron* deference. *Christensen*, 529 U.S. at 587. But not always. *See, e.g.*, *Mead*, 533 U.S. at 230 & n.13 (citing *Nationsbank of N.C., N.A. v. Variable Annuity Life Ins. Co.*, 513 U.S. 251, 256-57 (1995)).

Similarly, "the *presence* or absence of notice-and-comment rulemaking" is not "dispositive." *Barnhart v. Walton*, 535 U.S. 212, 222 (2002) (emphasis added). What matters instead, among other things, is "the careful consideration the [a]gency has given the question." *Id.* To be eligible for deference, the agency at a minimum must have engaged in a rigorous analysis of the relevant law and policy in a relatively formal proceeding and give precedential effect to such formal determinations. *See, e.g.*, *Pesquera Mares Australes Ltda. v. United States*, 266 F.3d 1372, 1380 (Fed. Cir. 2001).

B. The FCC Did Not Articulate An Interpretation Of Section 251(c)(2) That Has The Force Of Law.

There is no doubt that the Commission has "the authority to promulgate binding legal rules." *See Brand X*, 545 U.S. at 980-81; 47 U.S.C. §§ 151, 201(b). In this case, however, it did not exercise that authority. *Contra Brand X*, 545 U.S. at 981. The Commission asserts that its interpretations can be found in one sentence of ¶ 366 of the *Triennial Review Order*[7] and two sentences of ¶ 140 of the *Triennial Review Remand Order*.[8] *See* Gov't Br. 16-18. Those sentences, however, are not themselves legislative rules and do not carry the force of law.

The government itself concedes that, "[a]lthough the *Triennial Review Order* and the *Triennial Review Remand Order* amended the unbundling rules, they did nothing to alter the FCC's longstanding interconnection rules." Gov't Br. 28. Indeed, had the Commission attempted to set forth a rule in the *Triennial Review Order* or the *Triennial Review*

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[7] That sentence reads: "In reaching this determination we note that, to the extent that requesting carriers need facilities in order to 'interconnect[] with the [incumbent LEC's] network,' section 251(c)(2) of the Act expressly provides for this and we do not alter the Commission's interpretation of this obligation." *TRO* ¶ 366 (footnote omitted).

[8] Those sentences read: "We note in addition that our finding of non-impairment with respect to entrance facilities does not alter the right of competitive LECs to obtain interconnection facilities pursuant to section 251(c)(2) for the transmission and routing of telephone exchange service and exchange access service. Thus, competitive LECs will have access to these facilities at cost-based rates to the extent that they require them to interconnect with the incumbent LEC's network." *TRRO* ¶ 140 (footnote omitted).

Remand Order that incumbent LECs had to provide entrance facilities to competitors under § 251(c)(2), it would have violated the Administrative Procedure Act's (APA) notice-and-comment procedures. Section 553 of the APA provides that before promulgating a rule, an agency must provide notice of "either the terms or substance of the proposed rule or a descriptions of the subjects and issues involved." 5 U.S.C. § 553(b)(3). The agency must then allow interested persons the opportunity to comment on the subjects delineated in the notice. *Id.* § 553(c).

In this case, the notices of proposed rulemaking gave no indication that the Commission was preparing to render an interpretation of § 251(c)(2). Neither notice even cited that provision.[9] Instead, the notices confined themselves primarily to seeking comments on proposed changes to the FCC's unbundling regulations that implemented § 251(c)(3). No party therefore could reasonably have been expected to comment on whether entrance facilities comprised part of incumbent LECs' obligation to provide interconnection under § 251(c)(2). In all events, the Commission's sentences themselves do nothing to establish such a rule. In the *Triennial Review Order*, the Commission merely observed that competitive LECs may require certain "facilities" for interconnection with incumbent LEC networks and stated that it was not "alter[ing]" its interpretation of § 251(c)(2). So too in the *Triennial Review Remand Order*, the Commission simply reiterated that its amendment of the unbundling rules "does not alter" competitive LECs' rights to interconnection under § 251(c)(2). These sentences appear on their face to be mere clarifications rather than rules. Indeed, this language gives no indication – as would ordinarily be the case for a binding legislative rule – that any party was under an obligation to petition for review of the FCC's interpretation. *See* 28 U.S.C. § 2342; 47 U.S.C. § 402(a).

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[9] *See* Notice of Proposed Rulemaking, *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 16 FCC Rcd. 22781 (2001) ("*TRO NPRM*"); Order and Notice of Proposed Rulemaking, *Unbundled Access to Network Elements*, 19 FCC Rcd. 16783 (2004) ("*TRRO NPRM*").

The government's contention (at 31) that the Commission's orders are "legislative acts" does not change the analysis. It is well established that the FCC can promulgate legislative rules (through either rulemaking or adjudication) that are not codified in the Code of Federal Regulations. *See, e.g., Core Commc'ns, Inc. v. FCC*, 592 F.3d 139, 142-43 (D.C. Cir.) (upholding FCC "rules" contained in series of orders but not codified), *cert. denied*, 131 S. Ct. (2010). But in order for interpretations contained in those rules to have the force of law, they must still be subjected to the "fairness and deliberation" that *Mead* insists accompany "a pronouncement of such force." *Mead*, 533 U.S. at 230. Regardless whether *other* sections of the *Triennial Review Order* or the *Triennial Review Remand Order* may satisfy that test and be entitled to *Chevron* deference, the sentences for which the Commission claims deference in this case bear none of the hallmarks of interpretations that, under *Christensen* and *Mead*, have the force of law.

Similarly, it is of no moment that these sentences are to be found in a document that otherwise may have complied with notice-and-comment procedures. In *Wyeth v. Levine*, 129 S. Ct. 1187 (2009), for example, this Court considered whether deference to the Food and Drug Administration's interpretation of the scope of its preemption authority was warranted.

The notice of proposed rulemaking in that case stated that the agency was not considering "'policies that have federalism implications or that preempt State law,'" and therefore did not seek comment on the scope of permissible preemption. *Id.* at 1201 (quoting 65 Fed. Reg. 81,103 (Dec. 22, 2000)). Yet the final rule the agency promulgated "articulated a sweeping position on the [Food, Drug, and Cosmetic Act's] preemptive effect in the regulatory preamble." *Id.* The Court declined to find those pronouncements eligible for *Chevron* deference in part because the agency's "procedural failure" made their authority "inherently suspect." *Id.*

So too in this case, the Commission failed to adopt its interpretation through procedures "reasonably suggesting that Congress ever thought of [such pronouncements] as deserving the deference claimed for them here." *Mead*, 533 U.S. at 231. To accord *Chevron* deference in the circumstances described above would be to invite agencies to avoid using such procedures – notice-and-comment rulemaking in particular – simply by including new language in final rules. The scope of *Chevron* deference cannot reach so far.

II. THE FCC'S INTERPRETATIONS OF ITS OWN REGULATIONS IN THIS CASE DO NOT QUALIFY FOR DEFERENCE UNDER *AUER*

In *Auer*, this Court held that an agency's interpretation of its own regulations – even in an *amicus* brief – is owed deference unless the interpretation is "plainly erroneous or inconsistent with the regulation." 519 U.S. at 461 (internal quotation marks omitted); *see Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945).

The Court has appropriately limited the scope of *Auer* deference, however, to ensure that agencies do not circumvent formal processes of articulating rules and making policy. An agency receives no deference when it interprets a regulation that merely recites the statutory language; in that circumstance it must rely on processes with the force of law, as described above. *See Gonzales v. Oregon*, 546 U.S. 243, 256-57 (2006). Neither can an agency, "under the guise of interpreting a regulation, . . . create *de facto* a new regulation." *Christensen*, 529 U.S. at 588. That is, agency interpretations of ambiguous regulations are entitled to deference because it is presumed that an agency is best placed to interpret its own words. But an agency cannot rightly claim to be "interpreting" a regulation when it is in fact *changing* that regulation. Finally, the Court has cautioned that an agency's interpretation of its own regulations will not be accorded deference unless it "reflect[s] the agency's fair and considered judgment on the matter in question," *Auer*, 519 U.S. at 462, and does not work any "unfair surprise," *Long Island Care at Home*, 551 U.S. at 170. The Court reaffirmed these principles just this Term in *Chase Bank USA, N.A. v. McCoy*, 131 S. Ct. 871, 881-82 (2011). As the Court explained, deference ultimately depends on all "the circumstances of th[e] case." *Id.* at 884 (quoting *Auer*, 519 U.S. at 462).

Together, the limitations described above ensure that agencies produce rules and interpretations of those rules that are sufficiently "clear and definite so that affected parties will have adequate notice concerning the agency's understanding of the law." *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 525 (1994) (Thomas, J., dissenting). They also ensure that agencies do not exceed their delegated powers by avoiding notice-and-comment rulemaking. *See* John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 Colum. L. Rev. 612, 617 (1996) ("[O]ne must assess [*Seminole Rock's*] validity in light of the incentives that it supplies to an agency engaged in rulemaking."); *see also Shalala v. Guernsey Mem'l Hosp.*, 514 U.S. 87, 110-11 (1995) (O'Connor, J., dissenting).

A. The Commission Does Not Validly Interpret An Existing Regulation.

The Commission does not specify – in the *Triennial Review Order*, the *Triennial Review Remand Order*, or in its briefing in this litigation – any particular interconnection regulation that is susceptible of a deference-worthy interpretation. Indeed, neither *Triennial Review* order cites any interconnection regulation in the passages that the government now claims establish a rule that incumbent LECs must provide entrance facilities to competitors under § 251(c)(2).

The most likely candidate to support the government's interpretation is 47 C.F.R. § 51.321, although the government only cites the rule in passing (at 3, 14, 22, 24) and does not claim to be interpreting that rule. Section 51.321 announces a general requirement that incumbent LECs "provide . . . any technically feasible method of obtaining interconnection . . . at a particular point" to competitors upon request. 47 C.F.R. § 51.321(a). The regulation then explains that "[t]echnically feasible methods of interconnection . . . include, but are not limited to" two particular arrangements: "[p]hysical collocation and virtual collocation at the premises of an incumbent LEC" and "[m]eet point interconnection arrangements." *Id.* § 51.321(b).

To the extent the Commission is understood as "interpretating" this regulation, the claim must be that entrance facilities are a "technically feasible method of interconnection," within the general obligation in § 51.321(a). But that is not an *interpretation* of the regulation. It is an *amendment* of the regulation. The regulation articulates a broad standard followed by two specific instances of that standard. The specific instances are articulated prospectively and meant to bind all potential entities that are subject to the regulation. They are classic legislative rules. *See* 5 U.S.C. § 551(4) (defining "rule" as "the whole or part of an agency statement of general or particular applicability and future effect"); *Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1023 (D.C. Cir. 2000) (holding that agency "interpretation" was a "rule" because it "reads like a ukase," "[i]t commands, it requires, it orders, it dictates"); *see also* Peter L. Strauss, *The Rulemaking Continuum*, 41 Duke L.J. 1463, 1485 (1992).

As the Seventh Circuit has explained, unless a rule "can be derived from the regulation by a process reasonably described as interpretation," it is an amendment. *Hoctor v. USDA*, 82 F.3d 165, 170 (7th Cir. 1996) (Posner, J.). Arbitrarily specifying one particular instance of a general standard – as the government seeks to do here – is not interpretation. *See id.* at 171 ("There is no process of cloistered, appellate-court type reasoning by which the [agency] could have excogitated the [particular] rule from the [general] regulation."). In the absence of *interpretive* reasoning, the agency's choice must be justified by reference to policy concerns. Those concerns in turn must be articulated in notice-and-comment rulemakings or other agency actions that similarly require rigorous deliberation. If the Commission wanted to add another category of "technically feasible methods of . . . interconnection" to the list in Rule 51.321(b), it needed to do so through those procedures. *See Appalachian Power*, 208 F.3d at 1024 ("It is well-established that an agency may not escape the notice and comment requirements . . . by labeling a major substantive legal addition to a rule a mere interpretation.").

Auer deference is inappropriate when, as here, an agency's "interpretation" amounts to an amendment. "To defer to the agency's position" in such circumstances, "would be to permit the agency, under the guise of interpreting a regulation, to create *de facto* a new regulation." *Christensen*, 529 U.S. at 588. Lower courts have refused to grant *Auer* deference in similar circumstances. In *Hoctor*, for example, the court held that because the agency's interpretation was really an amendment, it could not be given "'controlling weight.'" 82 F.3d at 169 (quoting *Stinson v. United States*, 508 U.S. 36, 44-46 (1993)); *see id.* at 170-72. Other courts have reached similar conclusions. *See, e.g., United States v. Hoyts Cinemas Corp.*, 380 F.3d 558, 569 (1st Cir. 2004) ("The Department is free to interpret reasonably an existing regulation without formally amending it; but where . . . the interpretation has the practical effect of altering the regulation, a formal amendment – almost certainly prospective and after notice and comment – is the proper course."); *Mission Grp. Kan., Inc. v. Riley*, 146 F.3d 775, 781-83 (10th Cir. 1998) (declining to apply *Auer* deference to interpretive specification of "'any additional condition'" language in regulation); *Director, OWCP v. Mangifest*, 826 F.2d 1318, 1324-25 (3d Cir. 1987) (refusing to defer to "a mere position about what the regulations require" rather than "a reasoned interpretation of a regulation's language").

Indeed, to hold otherwise would be to invite agencies to "replace statutory ambiguity with regulatory ambiguity, thus creating . . . deference for any administrative action that might be squeezed within the unrestricted terms of a promulgated regulation." *Mission Grp.*, 146 F.3d at 782; *see also* Manning, *supra*, at 655 ("[A]n agency's right of self-interpretation should have an untoward effect upon its incentive to speak precisely and transparently when it promulgates regulations.").

B. The FCC's Interpretations Of The *Triennial Review Order* And *Triennial Review Remand Order* Are Not Entitled To Deference.

Alternatively, the Commission asserts that its interpretations of the *Triennial Review* orders in the course of this litigation are themselves subject to deference under *Auer*. Gov't Br. 30-31. The agency's position in this litigation is, in part, that ¶ 366 of the *Triennial Review Order* and ¶ 140 of the *Triennial Review Remand Order* require that an "incumbent's entrance facilities [be made] available to competitors as 'interconnection facilities' if used for interconnection." Gov't Br. 15. But the government has not – either in the court below or in this Court – advanced any reasoning sufficient to explain how it derives that rule from the few sentences it cites from the *Triennial Review* orders. The government's litigating position therefore cannot be said to "reflect the agency's fair and considered judgment" regarding the proper interpretation of the *Triennial Review* orders. *Auer*, 519 U.S. at 462.

In its brief in the court below, the Commission did little more than recite the language of ¶ 366 of the *Triennial Review Order* and ¶ 140 of the *Triennial Review Remand Order*. *See* Pet. App. 137a. The Commission did not explain *how* that language could be read to impose an obligation on incumbent LECs to provide entrance facilities to competitors for interconnection. Indeed, the Commission *conceded* that it "did not specifically define what it meant by the term 'interconnection facilities.'" *Id.* at 138a. Yet in the same sentence the Commission simply asserted – without any additional explanation – that the Michigan Public Service Commission's "interpretation of that term" was "fully consistent with the FCC's finding in the *TRRO*." *Id.* The Commission did not specify the "finding" to which it referred.

The government's brief in this Court still does not provide a "fair and considered" explanation of that rule, *Auer*, 519 U.S. at 462. The government argues that the court of appeals misread the *Triennial Review Remand Order*, but offers little competing interpretation. Gov't Br. 15-16.

The government asserts, for example, that "the FCC's orders use the term 'interconnection facility' to refer to an entrance facility that is being used for interconnection." *Id.* at 16. But ¶ 140 of the *TRRO* appears on its face to draw a distinction between the "entrance facilities" that the Commission deemed unavailable as unbundled network elements in the preceding paragraphs, and "interconnection facilities" that competitive LECs are entitled to pursuant to § 251(c)(2). The government does not explain why the Commission would have chosen to use different terms for the same thing in the same paragraph, does not even attempt to justify its interpretation of the paragraph in light of a more natural reading, and does not explain why it told the court below that it had left the term undefined (*see* Pet. App. 138a).

Similarly, ¶ 140 provides that competitive LECs "will have access to these [interconnection] facilities . . . to the extent that they *require* them to interconnect with the incumbent LEC's network." *TRRO* ¶ 140 (emphasis added).[10] In its briefing, the government now appears to treat the word "require" as though it means "request." *See* Gov't Br. 26-27. But the government makes no attempt to explain how such a transformation of the language of the *Order* can be accomplished.

Finally both ¶ 140 and ¶ 366 of the *Triennial Review Order* state that the Commission is not "alter[ing]" its interpretation of the underlying statute, 47 U.S.C. § 251(c)(2). But the government does not explain the content of the interconnection obligation, as it existed at the time of the *Triennial Review* orders. On the contrary, the government concedes that, prior to the *Triennial Review Order*, its "interconnection rules . . . [did] not expressly require incumbents to provide entrance facilities to satisfy their interconnection obligations under Section 251(c)(2)." Gov't Br. 22 n.6.

Affording deference to the interpretation proffered here would mark a significant expansion of the scope of *Auer* deference. This case is a far cry from the typical case where *Auer* deference is appropriate. In *Chase Bank*, for example, the Court considered whether certain increases in credit card interest rates constituted "change[s] in terms" under the Federal

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[10] The *Triennial Review Order* similarly referred only to facilities that competitive LECs "*need* . . . in order to interconnect" with incumbent LECs. *TRO* ¶ 366 (emphasis added; internal quotation mark and alteration omitted).

Reserve Board's Regulation Z. 131 S. Ct. at 879-80 (citing 12 C.F.R. § 226.9). In that case, the court concluded that a single phrase in a codified regulation was ambiguous, *see id.*, and deferred to the government's choice among two reasonable constructions, which the government had articulated consistently in briefs in the court of appeals and this Court. *See id.* at 880-81 & n.8. Similarly, in *Coeur Alaska, Inc. v. Southeast Alaska Conservation Council*, 129 S. Ct. 2458 (2009), the Court deferred to an agency interpretation of a single codified regulation that the Court itself found to be ambiguous because the agency provided "an instructive interpretive step" in explaining the regulation. *Id.* at 2473 (citing 40 C.F.R. § 122.3). In this case, by contrast, the government seeks deference to several narrative sentences in two distinct orders, unmoored from any codified regulation. The government does not explain how those sentences are ambiguous, what the competing constructions are, why one construction is better in its judgment than another, or why its position before the Sixth Circuit differed from its position here.

In short, the government's proposed rule poses a significant risk of "unfair surprise" to entities regulated under the Communications Act. *Long Island Care at Home*, 551 U.S. at 170. Regulated entities reading the text of the *Triennial Review* orders would have had little reason to expect that the three sentences at issue in those orders would yield a rule requiring incumbents to provide competitors with entrance facilities for interconnection. To derive that rule from ¶ 366 of the *Triennial Review Order* and ¶ 140 of the *Triennial Review Remand Order* requires the kind of analysis most likely to be carried out in notice-and-comment rulemaking. *Cf. Long*

Island Care at Home, 551 U.S. at 170-71 (finding no "unfair surprise" when agency pursued parallel notice-and-comment rulemaking); *Boose v. Tri-County Metro. Transp. Dist.*, 587 F.3d 997, 1005 n.13 (9th Cir. 2009) (same).

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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CURIAE
BRIEF

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Nos. 10-313 & 10-329

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TALK AMERICA INC.,

Petitioner,

v.

MICHIGAN BELL TELEPHONE COMPANY
d/b/a AT&T MICHIGAN,

Respondent.

ORJIAKOR N. ISIOGU, MONICA MARTINEZ,
and GREG R. WHITE, Commissioners of
the Michigan Public Service Commission,

Petitioners,

v.

MICHIGAN BELL TELEPHONE COMPANY
d/b/a AT&T MICHIGAN,

Respondent.

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**On Writs Of Certiorari To The United States
Court Of Appeals For The Sixth Circuit**

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BRIEF AMICUS CURIAE OF THE CALIFORNIA PUBLIC UTILITIES COMMISSION IN SUPPORT OF PETITIONERS

◆

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INTEREST OF AMICUS CURIAE[1]

Amicus curiae California Public Utilities Commission (CPUC or amicus) is the state agency in California that regulates privately owned telecommunications, electric, natural gas, water, railroad, and passenger transportation companies. The CPUC is the respondent in a pending petition for a writ of certiorari in the United States Court of Appeals for the Ninth Circuit filed by AT&T California, an affiliate of Respondent Michigan Bell Telephone Co. (AT&T Michigan). *Pacific Bell Tel. Co. v. California Pub. Utils. Comm'n*, 621 F.3d 836 (9th Cir. 2010), *petition for cert. filed*, 79 U.S.L.W. 3403 (U.S. Dec. 23, 2010) (No. 10-838). The question presented here is the same as that presented in the Ninth Circuit *Pacific Bell* petition. The CPUC submits this brief in continued support of both its decision at issue in the Ninth Circuit petition and, more broadly, the promotion of competition in local telecommunications services pursuant to section 251 of the Telecommunications Act of 1996 (the Act).

The CPUC has the consent of the parties to file this brief. On December 20, 2010 and January 4, 2011, respectively, Petitioners Isiogu, Martinez, and

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[1] Amicus California Public Utilities Commission and its counsel listed on the front cover authored this brief. No party or its counsel had any part in authoring this brief. No one other than amicus California Public Utilities Commission or its counsel has made any monetary contribution to the preparation or submission of this brief.

White and Petitioner Talk America Inc. (Talk America) sent letters to the Clerk of the Court giving consent to any amicus curiae brief. Respondent AT&T Michigan's December 20, 2010 letter indicating its consent is being filed concurrently with this brief.

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STATEMENT

Telephone Networks and Entrance Facilities. In the current local telecommunications market, incumbent local exchange carriers (ILECs) have their own separate infrastructures of wires and switches (computers that direct calls to their destinations), called networks, to move calls from one caller to another within their respective networks. Competitive local exchange carriers (CLECs) often have their own networks as well. A CLEC with its own network "interconnects" its network with an ILEC's network to allow customers of the two different companies to talk to one another. A CLEC without its own network either leases part or all of an ILEC's network or purchases telecommunications service from an ILEC and resells that service to its customers.

The telecommunications equipment at issue in this case is called an "entrance facility." An entrance facility is a type of transmission facility (*i.e.*, a high capacity wire) that connects ILEC and CLEC networks, such that telephone traffic can transfer seamlessly from one carrier's network to another. *Triennial Review Remand Order (TRRO)* ¶ 136;[2] *Pacific Bell*, 621 F.3d at 841-42, 844; *Michigan Bell Tel. Co. v. Covad Commc'ns Co.*, 597 F.3d 370, 372 (6th Cir. 2010), Pet. App. 3a.[3] The connection can be long or short, and multiple carriers' switches may be in the same building (known as "collocation"). *Illinois Bell Tel. Co. v. Box*, 526 F.3d 1069, 1071 (7th Cir. 2008), Pet. App. 82a.

Interconnection: One of the Two Uses of Entrance Facilities. Entrance facilities have two different uses, which neither AT&T Michigan nor AT&T California disputes. *See, e.g.*, Final Br. of Pl.-Appellee Michigan Bell Tel. Co. at 6 n.9, *Michigan Bell*, 597 F.3d 370 (6th Cir. 2010) (Nos. 07-2469, 07-2473), 2008 WL 5098822[4] (the same entrance facility "can be used for multiple purposes"); Br. of Appellant AT&T Cal. at 4, *Pacific Bell*, 621 F.3d 836 (9th Cir. 2010) (Nos. 08-15568, 08-15716), 2008 WL 3312433, at *4 ("CLECs can use entrance facilities in two different ways.").

First, for the telephone system to function, carriers must be able to "interconnect" – that is, calls must be able to move from one carrier's customer (located in that carrier's network) to another carrier's customer (located in the second carrier's network). This practice originated over one hundred years ago when local telephone companies interconnected so that their respective customers could call each other. *See Pacific Bell*, 621 F.3d at 840 ("Without the ability to link its network to that of the incumbent LEC, the competitive LEC would have little prospect of selling its telephone services[.] . . . A local telephone service is of little use if it cannot connect to other local telephone users."); *SBC, Inc. v. FCC*, 414 F.3d 486, 489-90 (3d Cir. 2005) (without interconnection, "customers of one carrier – e.g., the ILEC, that has historically served that area – would not be able to call customers of another carrier – e.g., a [CLEC], that has recently initiated service in that same area"). An entrance facility is a component of interconnection which enables a CLEC to physically connect its equipment to the ILEC's equipment, so that calls can move back and forth between the two networks.

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[2] Order on Remand, *Unbundled Access to Network Elements; Review of Section 251 Unbundling Obligations of Incumbent Local Exch. Carriers*, 20 FCC Rcd 2533 (2005), *aff'd*, *Covad Commc'ns Co. v. FCC*, 450 F.3d 528 (D.C. Cir. 2006).

[3] References to "Pet. App." are to the Appendix to Talk America's petition in No. 10-313.

[4] No Westlaw star pagination is available for this document.

Both AT&T Michigan here and AT&T California in *Pacific Bell* concede that entrance facilities serve this interconnection function. As AT&T Michigan stated, "[e]ntrance facilities are a *common means of achieving interconnection with an incumbent LEC*; AT&T Michigan and its incumbent LEC affiliates provide more than 15,000 entrance facility interconnection arrangements nationwide to competing LECs and wireless carriers today." Br. for Resp't 18 (emphasis added). *See Pacific Bell*, 621 F.3d at 844 ("As the term 'entrance' implies, entrance facilities provide a way for a competitive LEC's calls to enter AT&T's network and reach AT&T customers, a fact that AT&T concedes."). *See also* Final Br. of Pl.-Appellee Michigan Bell Tel. Co. at 6 n.9, *supra* at 3 ("an entrance facility may be used to exchange traffic with the ILEC by connecting the CLEC's switch to the ILEC's switch"); Br. of Appellant AT&T Cal. at 4, *supra* at 3 (CLECs "can use [entrance facilities] to 'interconnect' with the ILEC, to enable the CLEC's customer to call the ILEC's customer (and vice versa)").

As illustrated in Diagram 1 attached (a copy of the diagram the CPUC submitted to the Ninth Circuit in *Pacific Bell*), when CLEC customer C calls ILEC customer A, the call is first connected to the CLEC switch in the CLEC's own network. Then the CLEC's switch sends the call over the entrance facility to the ILEC's switch in the ILEC's switching center (the "tandem office"). The ILEC's switch then routes the call through its own network to its own customer A. App. 1.

Backhaul: The Second Use of Entrance Facilities. A CLEC also can use an entrance facility to transport its own customers' traffic from an ILEC's central office to the CLEC's switch. Using an entrance facility in this fashion – to route traffic to and from a CLEC's end users located in the ILEC's service territory – is known as an example of "backhauling" or "backhaul." *See* Br. for Resp't 25 n.28 (defining backhauling as the CLECs' "use of an entrance facility to connect its own switch to a loop . . . that the

[CLEC] obtained from an [ILEC] as an unbundled element under § 251(c)(3); the [CLEC] then uses its switch to provide telephone service to the customer connected to the unbundled loop"); AT&T Cal.'s Pet. for Panel Reh'g & Suggestion for Reh'g En Banc at 8, *Pacific Bell*, 621 F.3d 836 (9th Cir. 2010) (Nos. 08-15568, 08-15716) (to backhaul is "to route calls over ILEC facilities to a CLEC customer").

For example, and referring again to Diagram 1 attached, in order to allow CLEC customer C to call CLEC customer B (located in an ILEC's service area), the call moves from the CLEC's switch in its own network over the entrance facility to the ILEC's tandem office, where the CLEC has collocated equipment pursuant to section 251(c)(6) of the Act. The call then moves to another ILEC switching center (the "end office") where the CLEC also has collocated equipment, and then on to CLEC customer B via the ILEC's local loop (the wire connecting telephones to switches). In this way, the entrance facility is part of a chain of dedicated transmission facilities connecting the CLEC customer to the CLEC switch. When the entrance facility is used for backhauling in this manner, no traffic is exchanged between the ILEC and CLEC networks. App. 1.

Both the ILEC and CLEC involved in the lease of the entrance facility know whether the CLEC is using the entrance facility for interconnection or backhaul purposes, a fact that was not at issue either in this case or in *Pacific Bell*. *See Pacific Bell*, 621 F.3d at 842 n.8 (ILECs are "capable of screening out calls that would be used for backhauling. A computer identifies the destination of the call, and, if the call is bound for a customer of the competitive LEC, the computer can screen out the call."); *Southwestern Bell Tel., L.P. v. Missouri Pub. Serv. Comm'n*, 530 F.3d 676, 684 (8th Cir. 2008), Pet. App. 79a, *aff'g* 461 F. Supp. 2d 1055, 1072 (E.D. Mo. 2006) (the Missouri commission (and the district court) did not err in finding that "the entrance facilities requested by the CLECs would be used solely for interconnection purposes"); *Illinois Bell*, 526 F.3d at 1071-72, Pet. App. 84a ("The [Illinois] state commission tells us that ILECs can detect and block any attempted use of an entrance facility for backhauling. (Every carrier, ILEC or CLEC, must be able to determine the traffic's destination in order to route it accurately.)").

The Circuit Courts' Understanding of Backhaul. The Seventh, Eighth, and Ninth Circuits recognized that backhaul includes the movement of calls between a CLEC's switch and a CLEC customer located in an ILEC's service territory. *See Pacific Bell*, 621 F.3d at 842 (diagram), *amending Pacific Bell Tel. Co. v. California Pub. Utils. Comm'n*, 597 F.3d 958, 964 (9th Cir. 2010), Pet. App. 53a (identical diagram); *Southwestern Bell*, 530 F.3d at 681, Pet. App. 72a-73a; *Illinois Bell*, 526 F.3d at 1071, Pet. App. 82a-83a. Although the courts explained backhaul using the narrower example of two CLEC customers calling one another, the courts' use of the term backhaul is still accurate and correctly highlights the distinction between backhaul and interconnection, contrary to

AT&T Michigan's assertion otherwise. *See* Br. for Resp't 25 n.28. Regardless of what company serves the customer who ultimately receives the backhauled call, the CLEC nonetheless is using the entrance facility to move traffic to and from its own customer located within the ILEC's service area to a customer *other than the ILEC's customer*. Thus, no matter who is on the other end of the line, the CLEC is using the ILEC's network not to interconnect, but to serve its own customer.

In addition, the diagram in the Ninth Circuit's decision – albeit a simplified version of the diagrams the CPUC and AT&T California submitted – accurately depicts what an entrance facility is and its two different functions. *See Pacific Bell*, 621 F.3d at 842; *Pacific Bell*, 597 F.3d at 964, Pet. App. 53a. AT&T Michigan apparently believes the diagram places the entrance facility in, rather than connected to, the ILEC's switching facility (*i.e.*, the tandem office). Br. for Resp't 2 n.3. However, it is evident from the text of the decision that the Ninth Circuit understood how an entrance facility works. The court correctly described an entrance facility as a "high capacity wire that links telephone networks" and explained how the same entrance facility can be used for both interconnection and backhaul. *Pacific Bell*, 621 F.3d at 842.

The Telecommunications Act of 1996 and the Implementing Orders. Congress addressed interconnection in the Act. 47 U.S.C. §§ 201 *et seq.* (2011). The Act was designed to foster rapid development of competition in local telecommunications services by requiring ILECs, such as AT&T Michigan and AT&T California, to share their networks with competitors seeking entry into the traditionally monopolistic local service market.

Pursuant to section 251, ILECs must provide interconnection for the CLECs' facilities and equipment "at any technically feasible point within the [ILEC's] network." *Id.* § 251(c)(2). Separate and distinct from the interconnection obligation, ILECs also must provide CLECs with access to the ILECs' "unbundled network elements" (UNEs), *e.g.*, loops, switches, and transport facilities. *Id.* § 251(c)(3). To determine what network elements ILECs must make available under section 251(c)(3), the Federal Communications Commission (FCC) must consider whether the failure to provide access to the network elements would "impair" the CLEC's ability to provide telecommunications service. *Id.* § 251(d)(2). The rates ILECs may charge for section 251(c)(2) interconnection and section 251(c)(3) access to unbundled network elements must be based on the ILECs' cost. *Id.* § 252(d)(1). The FCC implemented these provisions of the Act in the 1996 *Local Competition Order* (*LCO*),[3] the 2003 *Triennial Review Order* (*TRO*),[4] and the 2005 *Triennial Review Remand Order* (*TRRO*).[7]

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[3] First Report & Order, *Implementation of Local Competition Provisions in Telecomms. Act of 1996*, 11 FCC Rcd 15499 (1996) (subsequent history omitted).

[4] Report & Order & Order on Remand & Further Notice of Proposed Rulemaking, *Review of Section 251 Unbundling Obligations of Incumbent Local Exch. Carriers*, 18 FCC Rcd 16978 (2003) (subsequent history omitted).

The Ninth Circuit *Pacific Bell* Decision. In 2006, the CPUC issued a decision ruling that CLECs are entitled to lease ILEC entrance facilities used for interconnection at cost-based rates pursuant to section 251(c)(2). AT&T California filed an action in the Northern District of California, appealing the CPUC's decision. In 2008, the district court ruled in the CPUC's favor. *Pacific Bell Tel. Co. v. California Pub. Utils. Comm'n*, No. 07-1797, 2008 WL 501390, at *6-7 (N.D. Cal. Feb. 21, 2008). The Ninth Circuit affirmed the district court's decision in March 2010. *Pacific Bell*, 597 F.3d at 965-69, Pet. App. 56a-63a.

Just days before the Ninth Circuit issued its decision, the Sixth Circuit issued its split decision ruling the opposite way. Pet. App. 1a. In September 2010, the Ninth Circuit denied rehearing and issued an amended decision "reject[ing] the reasoning advanced by AT&T and the Sixth Circuit in its recent 2-1 decision." *Pacific Bell*, 621 F.3d at 844. On December 10, 2010, the Court granted certiorari in *Isiogu* and *Talk America*. AT&T California filed a petition for a writ of certiorari in *Pacific Bell* on December 23, asking the Court to hold the petition pending the Court's decision in *Isiogu* and *Talk America*. *See* Pet. for Writ of Cert. at 7, *Pacific Bell*, No. 10-838 (U.S. Dec. 23, 2010). By letter to the Clerk of the Court dated January 10, 2011, the CPUC waived its brief in opposition to the *Pacific Bell* petition in light of the Court's grant of certiorari in these consolidated cases.

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[7] *See supra* note 2.

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SUMMARY OF ARGUMENT

Pursuant to the most reasonable interpretation of the Act, (1) a CLEC is entitled to access to an ILEC entrance facility to interconnect the CLEC's network with the ILEC's network so the customers of each can talk to one another, and (2) the appropriate rate for this use of the entrance facility is based on the ILEC's cost. Section 251(c)(2) requires ILECs to provide CLECs with interconnection at cost-based rates, and an entrance facility is just such a piece of equipment used to achieve interconnection. The Seventh, Eighth, and Ninth Circuits all agree.

The FCC's implementing orders support this interpretation. The FCC interpreted the interconnection obligation broadly in the *LCO* to include different methods and locations for interconnection at the CLEC's choosing. In the subsequent *TRO*, the FCC clarified that the interconnection duty includes the provision of entrance facilities. Ultimately, in the *TRRO*, the FCC found CLECs unimpaired without access to entrance facilities and declassified entrance facilities used for backhaul as an unbundled network element under section 251(c)(3). In paragraph

140, however, the FCC explicitly reaffirmed that its unbundling decision did not affect the section 251(c)(2) requirement (interpreted by the FCC in the *LCO* and the *TRO*) that ILECs provide interconnection facilities at cost-based rates. The issue in this case is whether an "entrance facility" used for interconnection is an "interconnection facility." Based on logic, common sense, and the FCC's interpretation of section 251(c)(2), the answer must be yes.

The Sixth Circuit's split decision to the contrary conflicts with the language of and pro-competitive policy behind section 251(c)(2) of the Act and the FCC's orders, all of which provide CLECs with a broad right to interconnect their networks with those of the ILECs for the mutual exchange of traffic and require ILECs to provide that interconnection. The CPUC urges the Court to reverse the Sixth Circuit's decision.

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ARGUMENT

THE COURT SHOULD HOLD THAT ILECS MUST LEASE ENTRANCE FACILITIES TO CLECS AT COST-BASED RATES WHEN CLECS USE SUCH ENTRANCE FACILITIES FOR INTERCONNECTION PURSUANT TO SECTION 251(C)(2) OF THE ACT

A. Section 251(c)(2) Requires ILECs to Provide the Actual Facilities for Interconnection, Including Entrance Facilities

Pursuant to section 251(c)(2) of the Act, an ILEC must provide, "for" a CLEC's "facilities and equipment," interconnection with the ILEC's network "at any technically feasible point within the [ILEC's] network." 47 U.S.C. § 251(c)(2); 47 C.F.R. § 51.305 (2011). The most rational interpretation of this section is that the interconnection the ILEC must provide includes the actual equipment to enable interconnection, one piece of which is an entrance facility.

First, an ILEC's entrance facility provides the required interconnection "for" the CLEC's "facilities and equipment," *i.e.*, the CLEC's network. Congress did not define the term "interconnection" or use the terms "interconnection facility" or "entrance facility." Yet the Act also does not specify what ILECs must do to satisfy the interconnection obligation, much less establish that the interconnection duty affirmatively excludes the provision of the actual facilities to achieve interconnection, such as an entrance facility.

which all parties agree does indeed provide that interconnection function. Because an entrance facility connects on one end with a piece of CLEC network equipment (a switch) and on the other end with a piece of ILEC network equipment (another switch), the ILEC's entrance facility provides interconnection "for" the CLEC's equipment.

An ILEC's entrance facility also provides interconnection "at any technically feasible point within the [ILEC's] network." The point at which the entrance facility connects with the ILEC's switch is such a point. As the Seventh Circuit stated, "[a]n entrance facility, designed for the very purpose of linking two carriers' networks, meets the requirement of feasibility, so a CLEC is entitled to hand off traffic to an ILEC at any entrance facility." *Illinois Bell*, 526 F.3d at 1072, Pet. App. 84a.

Somewhat confusingly, AT&T Michigan concedes that an entrance facility is a "common means of achieving interconnection" but also contends that an entrance facility is "not . . . part of 'interconnection'" but part of the ILEC's network itself, such that a CLEC cannot lease part of a network to interconnect with that network. Final Br. of Pl.-Appellee Michigan Bell Tel. Co. at 32, *supra* at 3. AT&T Michigan argues that, because one end of an ILEC-provided entrance facility connects with the CLEC's switch, interconnection occurs at a point on the CLEC's, not the ILEC's, network. *See* Br. for Resp't 21. Yet AT&T Michigan cannot avoid the fact that an entrance facility does provide the *physical link* between CLEC and ILEC switches that allows the customers of each network to talk to one another, and that physical link is interconnection. Indeed, whatever the interconnection method, interconnection by definition is always going to occur, on one end, at a point on the ILEC's network. It is just a question of where and how that physical link occurs.

Moreover, interpreting section 251(c)(2) to include the provision of entrance facilities used for interconnection is consistent with the policy behind the Act. Designed to promote competition in local telecommunications services by requiring ILECs to share their networks with new market entrants, the Act "ensures that incumbents do not charge competition-dampening rates for interconnection, a not insignificant risk given that entrants need interconnection more than incumbents do." *Michigan Bell*, 597 F.3d at 387-88 (Sutton, J., dissenting), Pet. App. 35a. Reading the Act to exclude the provision of equipment CLECs need to achieve interconnection (such as entrance facilities) would be contrary to the Act's pro-competitive purpose. Rather, section 251(c)(2) should be read (1) to require ILECs to provide the physical link between networks, a physical link that can occur in different ways and at different locations – "at any technically feasible point" the CLEC chooses – and (2) to include entrance facilities as such physical links.

B. Pursuant to the FCC's Implementation of Section 251(c)(2), Entrance Facilities Are a Form of Interconnection ILECs Must Provide

The FCC's orders implementing the Act support this interpretation of section 251(c)(2) as requiring ILECs to provide the actual equipment – *e.g.*, an entrance facility – to interconnect two networks. In the *LCO*, the FCC interpreted the right to interconnection broadly. In the *TRO*, it distinguished between the two uses of entrance facilities under section 251(c)(2) (the interconnection use) and section 251(c)(3) (the backhaul use). Finally, in the *TRRO*, the FCC re-confirmed the CLECs' right to obtain interconnection facilities – which include entrance facilities used for interconnection – at cost-based rates.

1. The *LCO* Set Forth the Breadth of Section 251(c)(2) Interconnection Choices

In the *LCO* – the first and primary order implementing the Act's interconnection requirements – the FCC emphasized the scope and breadth of the ILECs' section 251(c)(2) interconnection obligation, as distinct from the section 251(c)(3) unbundling obligation. Although the FCC did not explicitly use the term "entrance facilities," it broadly interpreted the interconnection duty to require ILECs to provide CLECs a wide range of physical facilities CLECs can use to interconnect their networks with the ILECs' networks. An entrance facility used for interconnection is just such a physical facility.

a. The FCC's Definition of Interconnection

The FCC began by defining interconnection as the "physical linking of two networks for the mutual exchange of traffic." *LCO* ¶ 176; 47 C.F.R § 51.5. The Circuit Courts have interpreted that "linking" to mean an actual facility or piece of equipment that physically joins two networks. *See Southwestern Bell*, 530 F.3d at 684, Pet. App. 79a, *citing AT&T Corp. v. FCC*, 317 F.3d 227, 234-35 (D.C. Cir. 2003) (looking to the District of Columbia Circuit's interpretation of interconnection as referring to "facilities and equipment"); *Competitive Telecomms. Ass'n v. FCC*, 117 F.3d 1068, 1071-72 (8th Cir. 1997) (noting the Act does not define interconnection and upholding the FCC's definition of interconnection as a "physical link"). *See also Southwestern Bell*, 461 F. Supp. 2d at 1072 (relying on the FCC's definition of interconnection as a physical link using facilities and equipment and rejecting argument that ILECs do not need to lease the interconnection facilities themselves to CLECs).

Then, in further articulating the practicalities of interconnection, the FCC included the actual, physical facilities used for interconnection within the ILEC's obligation and required ILECs to affirmatively "design" them. In the regulation entitled

"Interconnection," the FCC used the term "interconnection facilities" to refer to the facilities ILECs must provide to CLECs to enable interconnection. The regulation requires LECs to "design interconnection facilities" that are at least of the same quality as that which the ILEC provides itself, a subsidiary, or an affiliate. 47 C.F.R. § 51.305(a)(3). Thus, the FCC's initial analysis of interconnection included actual "interconnection facilities."

According to AT&T Michigan, however, the provision of entrance facilities to allow different carriers' customers to talk to one another involves the "transport" of CLEC traffic, such that the entrance facility does not fall under the FCC's definition of interconnection. Final Br. of Pl.-Appellee Michigan Bell Tel. Co. at 32-33, *supra* at 3. However, as the FCC explained, defining interconnection as a physical link between networks did not remove the ILEC's duty to route and terminate the traffic that moves through the interconnection point. *See LCO* ¶ 176 ("We also reject [the] argument that reading section 251(c)(2) to refer only to the physical linking of networks implies that incumbent LECs would not have a duty to route and terminate traffic."). The Ninth Circuit similarly rejected this argument and reasoned that, if the interconnection obligation "did not include any duty to provide *any* transport of calls, then § 251(c)(2) would be meaningless because incumbents could physically link networks with the competitive LEC, but refuse to carry calls to the incumbent LEC's terminal customers, thus effectively locking the competitive LEC out of the market." *Pacific Bell*, 621 F.3d at 846 n.16.

b. The FCC's Definition of "Technically Feasible" Points of Interconnection

Consistent with its broad definition of interconnection – including ILECs' provision of "interconnection facilities" in 47 C.F.R. § 51.305(a)(3) – the FCC similarly took a broad view of what constitutes a "technically feasible point" of interconnection. The FCC repeatedly emphasized that it is the CLEC's choice regarding where and how interconnection occurs. Once again, entrance facilities used for interconnection fit within this broad interpretation of what is technically feasible.

In exploring the concept of technical feasibility, the FCC explained that section 251(c)(2) "lowers barriers to competitive entry for carriers that have not deployed ubiquitous networks by permitting them to select the points in an incumbent LEC's network at which they wish to deliver traffic." *LCO* ¶ 209. The FCC concluded that a CLEC "may *choose any* method of technically feasible interconnection . . . at a particular point." *Id.* ¶ 549 (emphasis added). *See also* 47 C.F.R. § 51.321(a) (ILECs are required to provide "any technically feasible method of obtaining interconnection"); *LCO* ¶ 202 (the term feasible "encompass[es] more than what is merely 'practical' or similar to what is ordinarily done").

The FCC also refused to limit interconnection to any particular methods. *See id.* ¶ 549 (section 251(c)(2) "does not limit [the interconnection] duty to a specific method of interconnection"). Instead, the FCC concluded that it "should identify a minimum list of technically feasible points of interconnection" and gave examples of types. *Id.* ¶ 209. *See also id.* ¶ 550 (confining interconnection to just collocation – the only method section 251 explicitly mentions – would "dramatically" narrow the requirement that interconnection be made available at any technically feasible point). With that expansive view of interconnection in mind, "other methods of technically feasible interconnection . . . , such as meet point arrangements, in addition to virtual and physical collocation, must be available." *Id.* ¶ 553. *See also* 47 C.F.R. § 51.321(b) (technically feasible interconnection methods "include, but are not limited to" collocation at ILEC's premises and meet point interconnection arrangements). In this way, the FCC laid out an interconnection duty that "encompasses more than providing competitors with an outlet to plug into." *Michigan Bell*, 597 F.3d at 389 (Sutton, J., dissenting), Pet. App. 38a.

Finally, and perhaps most significantly, the FCC concluded that the ILECs' interconnection duty includes the modification and/or build-out of the ILECs' network facilities to accommodate interconnection. *LCO* ¶ 198. *See also* 47 C.F.R. § 51.5 (defining "technically feasible" and noting that "[t]he fact that an incumbent ILEC must modify its facilities or equipment to respond to [a CLEC's request for interconnection] does not determine whether satisfying such request is technically feasible"); *LCO* ¶ 202 (an ILEC "must accept the novel use of, and modification to, its network facilities to accommodate the interconnector"), ¶ 553 ("although the creation of meet point arrangements may require some build out of facilities by the incumbent LEC, we believe that such arrangements are within the scope of the obligations imposed by section[ ] 251(c)(2)").

This modification/build-out obligation does not unfairly burden the ILECs, as they can recoup the cost of accommodating the CLEC's choice of interconnection through rates, pursuant to section 252(d)(1). *See id.* ¶ 199 (a CLEC "that wishes a 'technically feasible' but expensive interconnection would, pursuant to section 252(d)(1), be required to bear the cost of that interconnection, including a reasonable profit"), ¶ 200 ("to the extent incumbent LECs incur costs to provide interconnection . . . , incumbent LECs may recover such costs from requesting carriers"), ¶ 209 ("because [CLECs] must usually compensate incumbent LECs for the additional costs incurred by providing interconnection, competitors have an incentive to make economically efficient decisions about where to interconnect"). *See also US W. Commc'ns, Inc. v. Minnesota Pub. Utils. Comm'n*, 55 F. Supp. 2d 968, 982-83 (D. Minn. 1999) (upholding state commission's order requiring an ILEC to build new facilities necessary for a new entrant to connect to the ILEC's network "at any technically feasible point of the CLEC's choosing" and noting parties' agreement that the new entrant would pay the cost).

Entrance facilities used for interconnection fall within this broad interconnection framework the FCC set out in the *LCO*. An entrance facility – whether existing or new – is a physical link between networks. As such, it meets the FCC's definition of interconnection, and ILECs must provide it to CLECs at cost-based rates. As Judge Sutton stated, "[e]ntrance facilities come within the ordinary meaning of a 'technically feasible method of obtaining interconnection.'" *See Michigan Bell*, 597 F.3d at 388 (Sutton, J., dissenting), Pet. App. 36a.

2. The *TRO* Confirmed That the Right to Interconnection Includes the ILECs' Provision of Entrance Facilities

In the *TRO*, the FCC concluded that ILECs no longer had to provide entrance facilities used for backhaul on an unbundled basis under section 251(c)(3), but did not touch the ILECs' duty to provide entrance facilities used for interconnection under section 251(c)(2). In paragraphs 365 and 366, the FCC carefully distinguished between the two different uses for such transmission facilities and preserved the requirement that ILECs make available facilities for interconnection. An entrance facility is one such interconnection facility.

As set forth above, the FCC defined the CLECs' right to interconnection in broad terms in the *LCO*.

In the *TRO*, the FCC took that broad duty and articulated a specific interconnection duty with regard to entrance facilities. *See Pacific Bell*, 621 F.3d at 846 ("Though the LCO did not expressly state that entrance facilities were one of the 'network elements' incumbent LECs were required to make available under 47 U.S.C. § 251(c)(2), the later [TRO] expressly interpreted the LCO to impose this obligation."). In paragraph 365, the FCC made the explicit finding that CLECs use "transmission connections" between ILEC and CLEC networks – *i.e.*, entrance facilities – for both interconnection and backhaul:

> [C]ompetitive LECs often use transmission links including unbundled transport connecting incumbent LEC switches or wire centers in order to carry traffic to and from its end users. These links constitute the incumbent LEC's own transport network. However, in order to access UNEs, including transmission between incumbent LEC switches or wire centers, while providing their own switching and other equipment, competitive LECs require a transmission link from the UNEs on the incumbent LEC network to their own equipment located elsewhere. *Competitive LECs use these transmission connections between incumbent LEC networks and their own networks both for interconnection and to backhaul traffic. Unlike the facilities that incumbent LECs explicitly must make available for Section 251(c)(2) interconnection*, we find that the Act does not require incumbent LECs to unbundle transmission

> facilities connecting incumbent LEC networks to competitive LECs *for the purpose of backhauling traffic*.

TRO ¶ 365 (emphasis added; footnote omitted). Thus, the FCC removed the section 251(c)(3) unbundling requirement for entrance facilities (*i.e.*, transmission links) used for *backhaul*.

Then, in paragraph 366, the FCC stated that it was not changing the CLEC's statutory right to interconnect using those same transmission facilities:

> In reaching this determination [that the "dedicated transport" unbundled network element includes only those transmission facilities within the ILEC's network] we note that, *to the extent that requesting carriers need facilities in order to "interconnect[ ] with the incumbent LEC's network," section 251(c)(2) of the Act expressly provides for this* and we do not alter the Commission's interpretation of this obligation.

Id. ¶ 366 (emphasis added) (footnotes omitted).

These paragraphs of the *TRO* are still good law today, contrary to what the Sixth Circuit found or what AT&T Michigan asserts. *See Michigan Bell*, 597 F.3d at 383 n.13, Pet. App. 25a; Br. for Resp't 25 n.28. In *United States Telecom Ass'n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004) (*USTA II*), the District of Columbia Circuit remanded the *TRO*'s section 251(c)(3) unbundling issue of whether entrance facilities used for backhaul are a network element and whether CLECs are impaired without access to that network element. *USTA II*, 359 F.3d at 585-86. The court focused on unbundling and did not address the FCC's discussion of the two uses for entrance facilities and/or the FCC's explicit preservation of the CLECs' right to obtain entrance facilities used for section 251(c)(2) interconnection. *See TRRO* ¶¶ 136-37.

Thus, as the Ninth Circuit aptly explained:

> [T]his portion of the TRO [¶¶ 365-66] was not vacated in *USTA II*. *USTA II* vacated only the TRO's conclusion that entrance facilities are categorically excluded from the definition of "network elements" under § 251(c)(3). The court did not rule on the validity of the FCC's conclusion that, under § 251(c)(2), incumbent LECs are obligated to offer entrance facilities at TELRIC [total element long-run incremental cost, *i.e.*, cost-based] rates.

Pacific Bell, 621 F.3d at 846 n.15 (citations omitted). *See also id.* at 841 (the "relevant parts" of the *LCO* and *TRO* "were not invalidated by courts"). In the subsequent *TRRO*, the FCC itself cited to Paragraph 366 of the *TRO*. *See infra* § B.3.b. Moreover, from a practical, commonsense perspective, the factual distinction between backhaul and interconnection did not suddenly disappear following remand of the *TRO*. CLECs use entrance facilities in these two different ways, as the parties all agree here.

3. The *TRRO* Preserved the Right to Entrance Facilities Used for Interconnection

In the *TRRO* – the FCC's fourth attempt to promulgate valid unbundling regulations under section 251(c)(3) – the FCC continued to recognize the two different uses of entrance facilities and reaffirmed the CLECs' right to obtain ILEC interconnection facilities – which include entrance facilities used for interconnection – at cost-based rates pursuant to section 251(c)(2). The FCC's finding that CLECs are not impaired under section 251(c)(3) without access to entrance facilities for backhaul had no effect on the CLECs' separate statutory right to lease entrance facilities used for section 251(c)(2) interconnection.

a. The Entrance Facility Regulation Promulgated in the *TRRO* Only Addresses Entrance Facilities Used Pursuant to Section 251(c)(3)

Like the *TRO*, the *TRRO* is a section 251(c)(3) unbundling order. *See TRRO* ¶¶ 1-4. In the section entitled "Entrance Facilities," the FCC revisited the issue of whether ILECs must offer entrance facilities on an unbundled basis and decided the answer was no: to the extent a CLEC wants to use an entrance facility to move traffic to and from its customers located in the ILEC's service territory, it should get its own entrance facility. *Id.* ¶¶ 136-141. *See also id.* ¶ 138 n.389 (noting that a particular CLEC "utilizes third-party providers for backhaul from [the CLEC's] collocation arrangements to [the CLEC's] switches"), ¶ 141 n.396 (referring to "dedicated facilities used for backhaul between networks").

Accordingly, the FCC's regulation effectuating that finding, 47 C.F.R. § 51.319 (entitled "Specific unbundling requirements"), is a section 251(c)(3) unbundling regulation. It provides that entrance facilities a CLEC uses for backhaul are delisted as unbundled network elements – *i.e.*, ILECs are no longer required to provide entrance facilities used for backhaul at cost-based rates. 47 C.F.R. § 51.319(e)(2)(i) ("Entrance facilities. An incumbent LEC is not obligated to provide a requesting carrier [*i.e.*, CLEC] with *unbundled access* to dedicated transport that does not connect a pair of incumbent LEC wire centers.") (emphasis added).

Indeed, 47 C.F.R. § 51.319(e)(2)(i) specifically refers to access to entrance facilities on an *unbundled* basis, therefore implicating section 251(c)(3), not section 251(c)(2). Reading this regulation to remove the ILECs' obligation to provide *all* entrance facilities (including those used for interconnection) ignores that the FCC set forth the section 251(c)(2) obligation in another regulation entitled "Interconnection," 47 C.F.R. § 51.305. *See supra* § B.1.a.; *Michigan Bell*, 597 F.3d at 390 (Sutton, J., dissenting), Pet. App. 39a-40a (reading the unbundling regulation to eradicate the interconnection obligation "turns the phrase 'with unbundled access' into a useless appendage"). In arguing that the FCC determined that CLECs also do not need cost-priced entrance facilities for interconnection (*see* Br. for Resp't 25-26), AT&T Michigan misreads the *TRRO*: the FCC only addressed entrance facilities used for backhaul on an unbundled basis under section 251(c)(3).

b. Paragraph 140 Clarified That the Section 251(c)(2) Interconnection Duty Regarding Entrance Facilities is Unchanged

Immediately following its discussion of removing the section 251(c)(3) unbundling requirement for entrance facilities, the FCC clarified that its decision to do so had no effect on the ILEC's separate section 251(c)(2) duty to provide interconnection. In paragraph 140, the FCC preserved the CLECs' right to use an entrance facility (a type of interconnection facility) at cost-based rates:

> We note in addition that our finding of non-impairment with respect to entrance facilities *does not alter the right of competitive LECs to obtain interconnection facilities pursuant to Section 251(c)(2)* for the transmission and routing of telephone exchange service and exchange access service. [n.394 *Triennial Review Order*, 18 FCC Rcd at 17204, para. 366.] Thus, competitive LECs *will have access to these facilities at cost-based rates to the extent that they require*

> *them to interconnect with the incumbent LEC's network.*

TRRO ¶ 140 (emphasis added).[5]

Although the FCC did not define the term interconnection facilities, it logically includes entrance facilities used for interconnection. First, as discussed above, paragraph 140 falls within a section of the *TRRO* entitled "Entrance Facilities," in which the FCC addressed removal of the section 251(c)(3) unbundling requirement for entrance facilities. *See Pacific Bell*, 621 F.3d at 845 ("although the FCC did not use the term 'entrance facilities' in Paragraph 140, the paragraph appears in a section of the TRRO entitled 'Entrance Facilities,' which solely discusses the effect of the FCC's finding as to entrance facilities").

Second, if the same physical facility that the FCC decided was no longer a section 251(c)(3) unbundled network element could not also act as a section 251(c)(2) "interconnection facility," the FCC would have had no reason to emphasize in its discussion of entrance facility unbundling that CLECs also have a right to interconnection facilities under section 251(c)(2). *See Michigan Bell*, 597 F.3d at 390 (Sutton,

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[5] A CLEC "requires" an entrance facility for interconnection when it does not have one of its own. *See Southwestern Bell*, 530 F.3d at 684, Pet. App. 78a-79a ("If a CLEC needs entrance facilities to interconnect with an ILEC's network, it has the right to obtain such facilities from the ILEC.").

J., dissenting), Pet. App. 40a-41a ("[W]hy would [the FCC] underscore the incumbents' continuing obligation to provide interconnection facilities? These points of emphasis make little sense if entrance facilities never function as § 251(c)(2) interconnection facilities.") (citations omitted). Similarly, AT&T Michigan's assertion that paragraph 140 only assured CLECs that ILECs would still provide "patch cords" that link two wires together for interconnection is not convincing. Final Br. of Pl.-Appellee Michigan Bell Tel. Co. at 39 n.23, *supra* at 3. If these patch cords are merely "ancillary equipment" (*id.* at 40), the FCC would not have had to be so careful in its discussion of entrance facility unbundling to preserve the CLEC's right to use them for interconnection.

Moreover, this interpretation is consistent with the FCC's discussion of interconnection in the LCO and TRO, as well as the Act itself. Indeed, in the footnote in paragraph 140, the FCC itself *cited to paragraph 366* of the *TRO* in support of its statement that CLECs have the right to obtain interconnection facilities. *TRRO* ¶ 140 n.394. The FCC had no need to repeat what it stated in the *TRO* regarding the backhaul/interconnection distinction because those parts of the *TRO* were not vacated. *See supra* § B.2.

c. The Continued Right to Entrance Facilities for Interconnection is Consistent with the FCC's Removal of the Unbundling Requirement

Requiring ILECs to provide entrance facilities for section 251(c)(2) interconnection also is consistent with and in no way undermines the FCC's decision to remove the section 251(c)(3) unbundling obligation from entrance facilities. The Seventh Circuit phrased the ILEC position and the response as follows:

> What's the point of specifying that CLECs cannot demand access to entrance facilities as unbundled network elements . . . if state commissions can turn around and require the same access at the same price anyway? The answer . . . is that CLECs do not enjoy the "same" access to entrance facilities under the state commission's decision as they did before the FCC's order. Until then CLECs could use entrance facilities for both interconnection and backhauling. Under the state's order, CLECs use entrance facilities exclusively for interconnection, just as the FCC said in ¶ 140.

Illinois Bell, 526 F.3d at 1071, Pet. App. 83a-84a.

Similarly, the Ninth Circuit concluded that, "[i]n light of the different economic considerations associated with the use of entrance facilities for interconnection, on the one hand, and for backhaul, on the other, the FCC could reasonably conclude that different regulations were appropriate." *Pacific Bell*, 621 F.3d at 847. The court further reasoned:

> Where a competitive LEC uses an interconnection facility for backhaul, only the competitive LEC benefits – both the originator and the recipient of the call are competitive LEC customers. But when the competitive LEC uses the entrance facility for interconnection, both competitor and incumbent benefit: the incumbent's customers can reach customers of the competitor, and vice versa.

Id.

Because sections 251(c)(2) and (c)(3) impose separate ILEC obligations, the FCC can change one obligation without changing (or "negating") the other. Conversely, retaining the interconnection requirement does not "re-impose" the "repealed" requirement. The section 251(d)(2) impairment analysis only applies under section 251(c)(3), so the FCC's finding that CLECs have competitive alternatives to entrance facilities used as unbundled network elements is irrelevant to the CLEC's right to the same equipment for interconnection under section 251(c)(2). Thus, the FCC's removal of the unbundling requirement did not change the CLECs' statutory right to obtain ILEC interconnection facilities, including entrance facilities used for interconnection. By maintaining the ILECs' obligation to offer their entrance facilities to CLECs for interconnection, the FCC acted consistently with the Act's purpose of promoting competition in local telephone service, as well as with its own prior orders, the *LCO* and *TRO*.

C. The Sixth Circuit Erred in Holding That an ILEC's Only Duty is to Allow a CLEC to "Plug in" its Own Equipment into the ILEC's Network

According to the majority in the Sixth Circuit, paragraph 140 of the *TRRO* merely provides that, if a CLEC builds its own entrance facility, the ILEC must let the CLEC hook that entrance facility up to the ILEC's network by providing an "interconnection facility" – nothing more than a place for the CLEC to "plug in" – at regulated rates. Yet the panel majority made a number of analytical errors, the most significant of which the CPUC discusses below, and misinterpreted the statute and the FCC's orders contrary to both their plain meaning and the Act's pro-competitive purpose.

1. The Sixth Circuit Mistakenly Concluded That an Entrance Facility Used for Interconnection Is Not a Type of Interconnection Facility

The panel majority concluded that the FCC used the terms "entrance facilities" and "interconnection facilities" to refer to different pieces of equipment. In doing so, the panel majority developed its own analogy of public park-goers in need of electricity plugging their "big orange extension cords" (*i.e.*, entrance facilities) into a homeowner's "outlet" (*i.e.*, the "interconnection facility"). *Michigan Bell*, 597 F.3d at 374 n.4, 379-82, Pet. App. 6a, 18a-23a. In their view, because entrance facilities "do not connect the CLEC with the ILEC network directly" (and instead connect the CLEC with the ILEC's "interconnection facility"), entrance facilities are not a technically feasible means of interconnection. *Id.* at 382 n.12, Pet. App. 24a. The panel majority is mistaken.

The FCC is clear – and the parties agree – that an entrance facility is a way to interconnect ILEC and CLEC networks. The FCC defined entrance facilities simply as the transmission links between ILEC and CLEC networks, without any limitation on the length of that link. The fact that the FCC did not include an "interconnection facility" definition in or around paragraph 140 of the *TRRO* is not a reason to ignore the FCC's consistently broad interpretation of interconnection in its prior orders, including its use of the term "interconnection facility" itself in 47 C.F.R. § 51.305(a)(3). Moreover, had the FCC not used the term before (which it had), the use of a term without an accompanying explicit definition does not foreclose a reasonable interpretation of that term's plain language: "interconnection" plus "facility" is simply a piece of equipment used to physically link networks, and an entrance facility is just such a piece of equipment.

Also, entrance facilities do indeed connect ILEC and CLEC network equipment; there is no intermediary, additional "interconnection facility." *See* Talk

America's Pet. for Writ of Cert. 26 (in "practical reality," the entrance facility provides the "bridge" between CLEC and ILEC networks); Br. of Appellant AT&T Cal. at 4 fig.2, *supra* at 3 (diagram showing only an "entrance facility" connecting CLEC switch with ILEC tandem office). Thus, by deciding that an entrance facility is somehow not a type of interconnection facility and creating an erroneous "big orange extension cord" analogy, the Sixth Circuit improperly developed its own definition of what an entrance facility is and then improperly substituted its definition in place of both the FCC's interpretation of interconnection and the facts the parties presented.

2. The FCC's Elimination of the Unbundling Requirement for Entrance Facilities Did Not Eliminate the Separate Interconnection Requirement, Contrary to the Sixth Circuit's Determination

The panel majority also improperly read the FCC's regulation eliminating the unbundling requirement as removing the ILEC's duty to provide all entrance facilities, regardless of how the CLEC uses them. *Michigan Bell*, 597 F.3d at 377, 382 n.12, 386, Pet. App. 12a-13a, 24a, 31a. This interpretation collapses the interconnection and unbundling obligations in direct conflict with the statutory language and the FCC's orders.

The ILECs' section 251(c)(2) interconnection duty and section 251(c)(3) unbundling duty are separate and distinct obligations. The analysis by which a state commission determines whether a CLEC is impaired without access to a particular network element applies only to the unbundling duty. 47 U.S.C. § 251(d)(2) ("[i]n determining what network elements should be made available *for purposes of subsection (c)(3)*," the FCC must consider whether the ILEC's failure to provide access to a network element would impair the ability of the CLEC to provide the services it seeks to offer) (emphasis added). *See Michigan Bell*, 597 F.3d at 389 (Sutton, J., dissenting), Pet. App. 38a ("an impairment analysis has no role to play under § 251(c)(2), and the FCC has never, to my knowledge, considered impairment when analyzing an [ILEC's] interconnection obligations") (citations omitted); *Illinois Bell*, 526 F.3d at 1072, Pet. App. 84a (the rate an ILEC can charge for entrance facilities used for interconnection "is not related to the scope of an ILEC's obligations under § 251(c)(3) to furnish unbundled network elements").

When the FCC decided that CLECs were not impaired without access to entrance facilities under section 251(c)(3), it issued 47 C.F.R. § 51.319(e)(2)(i), a regulation which, by its terms, relates only to section 251(c)(3) unbundling and removes the ILEC's obligation to provide entrance facilities on an unbundled basis. This regulation has no effect on ILECs' separate and distinct duty to provide entrance facilities used for interconnection under section 251(c)(2). Contrary to the panel majority's reasoning, the FCC did indeed explicitly apply two different rules (under sections 251(c)(2) and 251(c)(3)) to the "same exact wire" based on the functions of that wire, and it was reasonable for the FCC to do so.

3. The Sixth Circuit Disregarded Both the Fact That CLECs Use the Same Entrance Facility in Two Different Ways and the FCC's Regulatory Distinction Between These Uses

In addition, the panel majority erroneously rejected the distinction between the backhaul and interconnection uses of entrance facilities. They reasoned that the *TRRO* did not discuss the backhaul versus interconnection distinction and that the *TRO*'s discussion of backhaul and interconnection is no longer valid. *Michigan Bell*, 597 F.3d at 381-82, 383 n.13, 384-86, Pet. App. 21a-23a, 25a, 27a-31a. However, there is no dispute here (or in *Pacific Bell*) – and the Sixth Circuit was wrong to create one where one did not exist – that a CLEC can use an entrance facility for either interconnection or backhaul. The FCC already had distinguished between these two different uses in paragraphs 365 and 366 of the *TRO*, and that discussion still stands. There was no reason for the FCC to repeat those findings in the *TRRO*.

4. The Act Should be Interpreted to Expand the CLECs' Interconnection Choices, Not Limit Them

In ultimately concluding that all an ILEC must do under section 251(c)(2) is make a "plug-in" location available to the CLEC, and not provide any actual equipment to facilitate that connection, the Sixth Circuit improperly limited that CLEC's interconnection choices, in direct conflict with both the Act and the FCC's orders. No longer is a CLEC able to interconnect via "any technically feasible" method under the statute; rather, the ILEC is given the power to choose whether a piece of equipment is an entrance facility or an interconnection facility. *See id.* at 390-91 (Sutton, J., dissenting), Pet. App. 41a. By concluding that an entrance facility becomes an interconnection facility only when the ILEC says the CLEC must use it, the majority granted ILECs control over choosing the point of interconnection where no such power should exist, ignored the ILEC's duty to provide interconnection at any technically feasible point the CLEC picks, and interpreted section 251(c)(2) in a way that directly conflicts with the Act's purpose of promoting competition.

◆

CONCLUSION

For the reasons stated above, the CPUC urges the Court to reverse the Sixth Circuit's decision.

Respectfully submitted,

February 3, 2011

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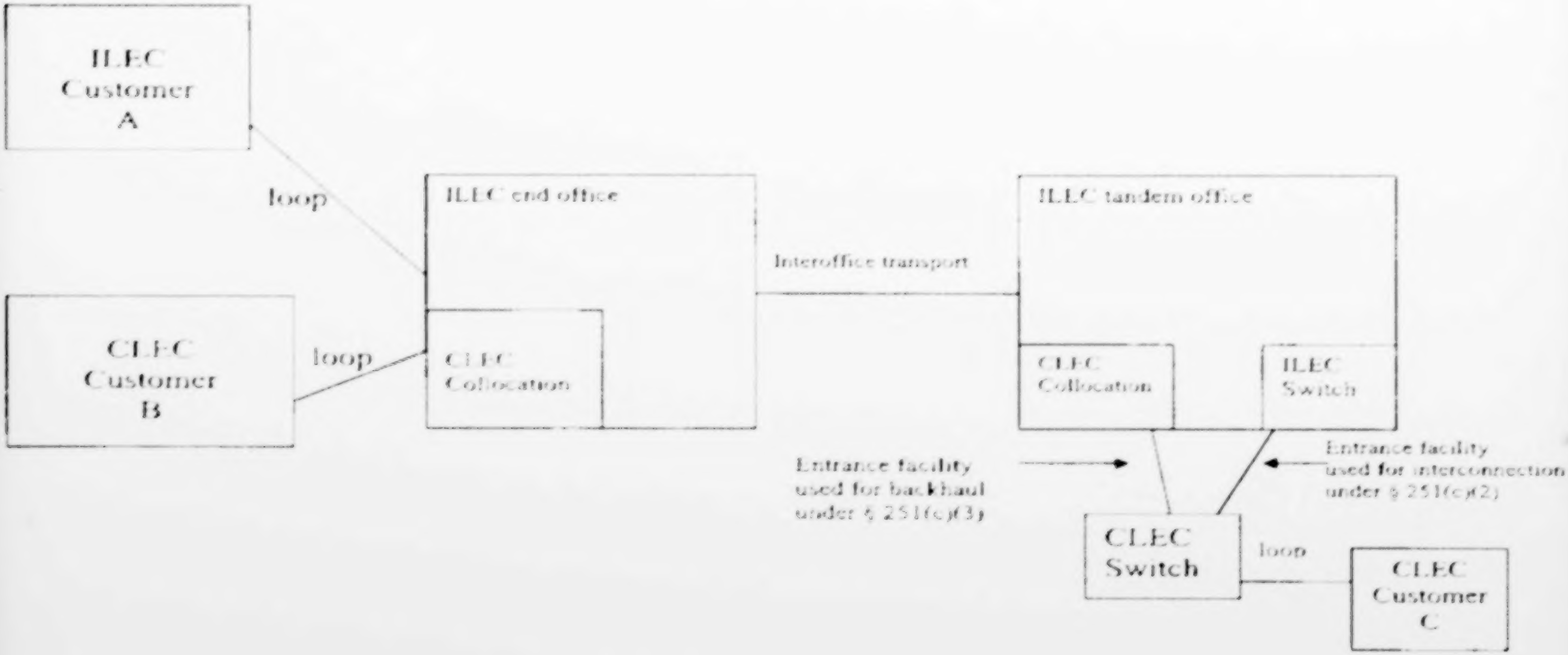
App 1

Diagram 1



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BRIEF

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In the Supreme Court of the United States

TALK AMERICA, INCORPORATED, PETITIONER
v.
MICHIGAN BELL TELEPHONE COMPANY, DBA AT&T MICHIGAN, RESPONDENT.

ORJIAKOR ISIOGU, ET AL., PETITIONERS
v.
MICHIGAN BELL TELEPHONE COMPANY, DBA AT&T MICHIGAN, RESPONDENT.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF FOR CENTURYLINK, QWEST COMMUNICATIONS INTERNATIONAL, AND WINDSTREAM CORPORATION AS AMICI CURIAE SUPPORTING RESPONDENT

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INTEREST OF AMICI CURIAE[1]

Amici Qwest Communications International Inc ("Qwest"), CenturyLink, Inc. ("CenturyLink"), and Windstream Corporation ("Windstream") are, through their operating companies, among the nation's largest incumbent local exchange carriers ("ILECs") providing service in both urban and rural areas throughout the United States.

Qwest provides local exchange telecommunications, exchange access, information access, data and interexchange long distance services pursuant to tariffs and contracts within a 14-state incumbent local exchange region.

CenturyLink provides voice, broadband and video services to consumers and businesses in 33 states.

In 2010, Qwest Communications International Inc., the parent of Qwest, and CenturyTel, Inc. d/b/a CenturyLink, announced their intention to merge. Subject to remaining regulatory approvals, the merger is expected to close during the second quarter of 2011.

Windstream is one of the largest providers of telecommunications services, primarily in rural communities in the United States. It provides voice, broadband, and video services to customers in 29 states.

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[1] The parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no counsel or a party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae* or its counsel made a monetary contribution to its preparation or submission.

Amici are identically situated to respondent Michigan Bell Telephone Company ("AT&T"). Like AT&T, amici are subject to the interconnection duty in 47 U.S.C. § 251(c)(2). Some state commissions in the states in which amici operate have interpreted that section to require amici to provide entrance facilities to competitive local exchange carriers ("CLECs") at TELRIC rates. Other state commissions, however, have correctly rejected that interpretation,[2] as did the United States Court of Appeals for the Sixth Circuit.

SUMMARY OF ARGUMENT

Section 251 of the Telecommunications Act of 1996 ("the Act") imposes on incumbent local exchange carriers ("ILECs") the obligation to provide CLECs with "nondiscriminatory access to network elements on an unbundled basis." 47 U.S.C. § 251(c)(3). The FCC determines the unbundled network elements ("UNEs") ILECs are required to provide, and it can require unbundling of a network element only if it finds that an ILEC's failure to provide access to the element "would impair the ability of the [competitor] . . . to provide . . . service[]." *Id.* § 251(d)(2)(B).

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[2] See, e.g., Order Addressing Applications for Rehearing, Reargument, or Reconsideration, *Sprint Communications Company L.P.'s Petition for Arbitration with CenturyTel of Eagle, Inc. Pursuant to § 252(b) of the Communications Act of 1934, as Amended by the Telecommunications Act of 1996*, Docket No. 08B-121T, Decision No. C08-1218, 2008 WL 5158834 (Colo. Pub. Utils. Comm'n Nov. 20, 2008). But see Order, *Sprint Communications Company L.P. Petition for Arbitration of an Interconnection Agreement with CenturyTel of Oregon, Inc.*, ARB 830, Order No. 08-486, 2008 WL 4493108 (Or. Pub. Utils. Comm'n Mar. 31, 2009).

The rates that apply to UNEs are set by state commissions applying the FCC's total element long run incremental cost ("TELRIC") methodology. Under this pricing scheme, state commissions base rates on the hypothetical cost of a UNE, not on the cost the ILEC actually incurs to provide it. The statutory basis for TELRIC no longer exists when it becomes economically feasible for competitors to construct the facility in question or to obtain it from non-ILEC sources. At that point, requiring TELRIC prices for non-bottleneck facilities suppresses facilities-based competition, which is directly contrary to the ends the Act is designed to achieve.

The FCC's non-impairment finding for entrance facilities establishes that there is a competitive market for these facilities. Permitting petitioners to obtain entrance facilities at TELRIC rates in this circumstance would embrace a policy of long-term dependence on ILECs' facilities at below-market prices and contravene the Act's purposes. The judgment of the court of appeals should be affirmed.

ARGUMENT

A. Requiring Incumbents to Provide Non-Bottleneck Network Elements at TELRIC Rates Undermines the Objectives of the 1996 Act

1. The preamble to the Telecommunications Act of 1996 concisely describes the end and the means

Congress had in mind when it passed this landmark legislation. The Act is designed to:

> promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies.[3]

The end is a competitive market in which service quality meets customer expectations and continuing investment in infrastructure leads to innovative services. Congress established competition as the means to these ends, particularly "facilities-based" competition for local telephone service. *United States Telecom Ass'n v. FCC*, 359 F.3d 554, 579 (D.C. Cir. 2004) ("*USTA II*").

To facilitate the opening of local telecommunications markets, Section 251 imposes on ILECs the obligation to provide CLECs with "nondiscriminatory access to network elements on an unbundled basis." 47 U.S.C. § 251(c)(3). The FCC determines the UNEs ILECs are required to provide, and it can require unbundling of a network element only if it finds that an ILEC's failure to provide access to the element "would impair the ability of the [competitor] . . . to provide . . . service[]." *Id.* § 251(d)(2)(B). This unbundling obligation was based on the determination that economies of scale in certain portions of the ILECs' networks created bottleneck facilities that could present insurmountable barriers to entry.[4]

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[3] Pub. L. No. 104-104, 110 Stat. 56 (preamble).

The rates that apply to UNEs are set by state commissions applying the FCC's total element long-run incremental cost ("TELRIC") methodology. Under this pricing scheme, state commissions base rates on the "hypothetical cost" of a UNE, not on the cost the ILEC actually incurs to provide it.[5] The FCC has recognized that requiring ILECs to provide network elements under this hypothetical pricing construct "is one of the most intrusive forms of economic regulation."[6] And the Supreme Court has similarly commented that TELRIC gives CLECs access to UNEs at rates that are "just above the confiscatory level."[7]

Although TELRIC is meant to simulate the costs a carrier would incur to build a network in a competitive market, it does not in fact do so.

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[4] First Report and Order, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd 15499, ¶ 232 (1996) ("*Local Competition Order*"), *modified on recon.*, 11 FCC Rcd 13042 (1996), *vacated in part*, *Iowa Utils. Bd. v. FCC*, 120 F.3d 753 (8th Cir. 1997), *aff'd in part, rev'd in part sub nom. AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366 (1999).

[5] *Local Competition Order* ¶ 672.

[6] Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 18 FCC Rcd 16978, ¶141 (2003) ("*Triennial Review Order*" or "*TRO*"), *vacated in part by USTA II*, 359 F.3d 554.

[7] *Verizon Communications, Inc. v. FCC*, 535 U.S. 467, 489 (2002).

Instead, it relies on hypothetical assumptions that understate the true costs of providing a network element, leading to prices that are consistently below those that would actually prevail in a competitive market.[7] The methodology begins with the assumption that a hypothetical carrier is instantaneously replacing an ILEC's existing network with a new network comprised entirely of the most current, state-of-the-art technology and equipment.[8]

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[7] See *Illinois Bell Tel. Co. v. Box*, 548 F.3d 607, 609 (7th Cir. 2008) (Posner, J.). See also *Verizon*, 535 U.S. at 501 (TELRIC is based on the "hypothetical" cost of a "most efficient element," "untethered to" either the incumbent's "historical investment" or the cost of the "actual network element being provided."); *Qwest Corp. v. Arizona Corp. Com'n*, 567 F.3d 1109, 1114 (9th Cir. 2009) (describing TELRIC prices as "below-market" and "highly favorable to CLECs"); *USTA II*, 359 F.3d at 562 (the TELRIC formula results in very low rates that are "well below the costs the [incumbents] had actually historically incurred in constructing the elements")

[8] See 47 C.F.R. § 51.505(b)(1) ("The total element long-run incremental cost of an element should be measured based on the use of the most efficient telecommunications technology currently available and the lowest cost network configuration, given the existing location of the incumbent LEC's wire centers."); *Verizon*, 535 U.S. at 540 (Breyer, J., concurring in part and dissenting in part) ("the regulator must look to what it would cost a hypothetical perfectly efficient firm to supply that element in the future, assuming that the hypothetical firm were to build essentially from scratch a new, perfectly efficient communications network"); Notice of Proposed Rulemaking, *Review of the Commission's Rules Regarding the Pricing of Unbundled Network Elements and the Resale of Service by Incumbent Local Exchange Carriers*, 18 FCC Rcd 18,945, ¶ 31 (2003) ("UNE NPRM") (describing industry comments that TELRIC assumption of "new technology [being] deployed

In reality, carriers build networks over extended periods of time, and the equipment they use is therefore always a mix of new and older technologies. The FCC has recognized this disconnect between TELRIC and the reality of conditions in a competitive market:

> One of the central internal tensions in the application of the TELRIC methodology is that it purports to replicate the conditions of a competitive market by assuming that the latest technology is deployed throughout the hypothetical network . . . . In the real world, however, even in extremely competitive markets, firms do not instantaneously replace all of their facilities with every improvement in technology. Thus, even the most efficient carrier's network will reflect a mix of new and older technology at any given time.[10]

TELRIC also assumes that the hypothetical carrier builds the right amount of capacity to meet present and future demand.[11] But in competitive

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instantaneously and ubiquitously is unrealistic even in the most competitive markets").

[10] *TRO* ¶ 50.

[11] See *UNE NPRM* ¶ 49 (TELRIC models are designed "to build an efficient network today to serve all customer locations within a particular geographic area"); 47 C.F.R. § 51.505(b)(1) ("The total element long-run incremental cost of an element should be measured based on the use of the most efficient telecommunications technology currently available and the lowest cost network configuration, given the existing location of the incumbent LEC's wire centers."); *Verizon*, 535 U.S. at 505,

markets, carriers rarely have exactly the right amount of capacity to meet demand during any given period, and any excess or insufficient capacity raises costs above ideally efficient levels. The fundamental reality, therefore, is that no carrier – neither an ILEC nor a CLEC – could build a network facility at a TELRIC cost.[12]

Although TELRIC significantly understates the actual costs of providing network elements, the Court held in *Verizon* that the methodology was not an unreasonable interpretation of § 251(d)(2) as applied to the "bottleneck" elements mandated by § 251(c)(3), where an ILEC's failure to provide access to the element "would impair the ability of the [competitor] . . . to provide . . . service[]."[13] In other

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("TELRIC requires ratesetters to calculate cost on the basis of 'the existing location of the incumbent['s] wire centers.'"); *id.* at 540 (Breyer, J., concurring in part and dissenting in part) ("the regulator must look to what it would cost a hypothetical perfectly efficient firm to supply that element in the future, assuming that the hypothetical firm were to build essentially from scratch a new, perfectly efficient communications network. The only concession to the incumbent's actual network is the presumption that presently existing wire centers-which hold the switching equipment for a local area-will remain in their current locations.").

[12] The below-market rates that TELRIC provides are analogous to the discounted rates normally available in the marketplace only with long term commitments. For example, a long term car lease (*e.g.*, a 36-month lease) is significantly less expensive on a per-day basis than renting a car for a few days. With TELRIC, however, CLECs have the benefit of low rates without making any long term commitment, which is another deviation from normal competitive marketplaces.

[13] See *Verizon*, 535 U.S. at 510; 47 U.S.C. §251(d)(2)(B).

words, the question in *Verizon* was only whether TELRIC could be used for those network elements that meet the impairment test and are "unsuitable for competitive supply." *United States Telecom Ass'n v. FCC*, 290 F.3d 415, 427 (D.C. Cir. 2002) ("*USTA I*").

But that holding is inapplicable when a CLEC ceases to be "impaired" by the unavailability of a facility, which occurs when alternative facilities are readily available in the market or when it becomes economically feasible for competitors to construct their own facility. At that point, requiring hypothetical TELRIC prices for facilities suitable for competitive supply would produce results directly opposite to the ends the Act is designed to achieve. That is, the availability of TELRIC-priced network elements in this circumstance would actually suppress facilities-based competition, because the TELRIC price would be lower than a CLEC's cost to build the element itself. Thus, once competitors are no longer "impaired" by the unavailability of a facility from the ILEC on an unbundled basis, the justification for requiring the facility to be priced at TELRIC no longer exists.

Applying these principles in the instant case, using TELRIC pricing for entrance facilities would undermine the central purposes of the Act. In the 2005 *Triennial Review Remand Order* ("*TRRO*"),[14] the FCC ruled that entrance facilities no longer meet the impairment standard of Section § 251(c)(3) and are not bottleneck elements. The FCC found that these facilities have "unique operational and economic characteristics" that permit CLECs to self-provide or to obtain them from other competitive carriers. *TRRO* ¶¶ 138-139, 141.

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[14] Order on Remand, *Unbundled Access to Network Elements; Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 20 FCC Rcd 2533 (2005), *petitions for review denied*, *Covad Communications Co. v. FCC*, 450 F.3d 528 (D.C. Cir. 2006).

The FCC's non-impairment finding was based on extensive evidence establishing that entrance facilities "are widely available" on a national basis. *Id.* Carriers demonstrated, for example, that CLECs "are steadily deploying their own entrance facilities," proving an absence of economic obstacles to self-deployment. *Id.* ¶ 138 & n.387. Other evidence established that competing carriers are having "success in finding non-incumbent LEC providers of entrance facilities," and that almost all competitively deployed transport links are entrance facilities." *Id.* ¶ 139 & n.393. Thus, Verizon established that it had recently migrated more than 32,000 entrance facility circuits to non-Verizon facilities, and BellSouth similarly reported that between 10 to 20 percent of the entrance facilities it had provided to CLECs had recently been replaced by other sources. *Id.* ¶ 139. Indeed, the evidence of the broad availability of non-ILEC sources of entrance facilities was so compelling that the FCC implemented its non-impairment determination immediately, finding that there was no justification for a gradual phase-out that some CLECs had requested. *Id.* ¶ 141 &n. 395.[15]

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[15] Since the *TRRO*, CLECs have continued in full force to shift from ILEC entrance facilities, either through self-provisioning or, more commonly, by obtaining a cross-connect

2. The FCC's non-impairment finding establishes that there is a competitive market for entrance facilities and thus no need to simulate competitive prices for those facilities through TELRIC rates. Indeed, applying TELRIC in a market that is competitive would undermine the very competition that the pricing methodology is meant to encourage when applied to bottleneck facilities.

Permitting CLECs to obtain entrance facilities at TELRIC rates would embrace a policy of long-term dependence on ILECs' facilities at below-cost prices – prices designed to apply solely to network elements CLECs cannot build or obtain from other sources.[16] It would have the effect of suppressing competition where the FCC has found it already exists. That is, if the prices that apply to bottleneck facilities were continued for entrance facilities, the CLECs and other providers that have been supplying entrance facilities would have difficulty competing with those prices and, over time, could have no choice but to

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within an ILEC's central office that is linked to a transmission facility purchased from a competitive provider. Many competitive providers are established in this business. For example, Zayo Group provides fiber alternatives to ILEC entrance facilities in approximately 150 markets in 30 states and the District of Columbia. Regional providers also are major competitive players in the market for entrance facilities. DukeNet Communications, FPL FiberNet, and DeltaCom's Interstate FiberNet, for example, provide these facilities even in small markets and low-density communities. These providers advertise their network facilities on their websites.

[16] See *Verizon*, 535 U.S. at 510, n. 27; *Local Competition Order*, ¶ 702.

stop supplying.[17] These providers would have no economically rational incentive to focus their resources and energy on investing in facilities and producing the technological innovations and consumer benefits the Act is designed to foster.[18]

Similarly, CLECs that have not yet invested in their own facilities would be less likely to do so if regulated prices were available in a competitive market. Any rational carrier would have to think twice about putting its capital at risk to build a network element if a below-cost leasing option were available.[19]

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[17] *Michigan Bell Telephone Co. v. Covad Communications Co.*, 597 F.3d 370, 373-74 & n.4, 386 (6th Cir. 2010).

[18] See *Local Competition Order* ¶¶ 125-39.

[19] See *USTA I*, 290 F.3d at 424, 427 ("If parties who have not shared the risks are able to come in as equal partners on the successes, and avoid payment for the losers, the incentive to invest plainly declines."); *Verizon New England, Inc. v. Maine Pub. Utils. Comm'n*, 509 F.3d 1, 9 (1st Cir. 2007) (Boudin, C.J.), *on denial of reh'g*, 509 F.3d 13 (1st Cir. 2007) (per curiam) ("[M]aking a monopolist share ... 'essential facilities' can promote competition; but it can also retard investment, handicap competition detrimentally, and discourage alternative means of achieving the same result that could conceivably enhance competition...."); *AT&T Commc'ns of Ill., Inc. v. Ill. Bell Tel.*, 349 F.3d 402, 404 (7th Cir. 2003) ("Prices for unbundled elements affect not only the allocation of income among producers but also new investment and innovation: if the price to rivals is too low, they won't build their own plant (why make capital investments when you can buy for less, one unbundled element at a time?), and the incumbents won't maintain or upgrade their facilities (why make costly capital investments if you have to sell local loops to rivals for less than it costs to produce them?)").

For these reasons, the FCC itself has emphasized that market prices must prevail when there is a competitive supply of a network element, and that it would be "counter-productive" to use TELRIC prices in this circumstance because those prices are designed, "at best" to merely "reflect the pricing of a competitive market.[20] Consistent with this pronouncement, federal courts have uniformly ruled that attempts by state commissions to apply TELRIC prices to non-impaired network elements violate the policies underlying the Act and are prohibited.[21] And precisely the same logic applies to efforts by state commissions and others to obtain entrance facilities at TELRIC rates.

In sum, the Act's ultimate objective is to move the telecommunications industry to competitive markets in which CLECs and ILECs invest, innovate and engage in facilities-based competition. That objective can only be achieved be removing regulatory controls, including the requirement of unbundling at TELRIC rates, when there is no longer competitive impairment for network elements. Perpetuating TELRIC rates for entrance facilities, as petitioners request, would undermine facilities-based competition, reduce innovation, and deny consumers the full benefits of a competitive market.

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[20] *TRO* ¶ 651 (emphasis added).

[21] See *Qwest Corp.*, 567 F.3d at 1115-16 (state public utilities commissions lack authority under Section 271 to set cost-based pricing schemes); *Illinois Bell Telephone Co., Inc.*, 548 F.3d at 613 ("while network services provided by incumbent local exchange carriers that are necessary to enable a competing carrier to provide service are to be priced at cost, any additional network services that a Bell operating company (that wants to provide long-distance service) must provide unbundled access to can be priced at the market price"). *Verizon New England, Inc.*, 509 F.3d at 9 ("one issue is whether the states can require that section 271 elements be priced at TELRIC rates. The FCC orders provide carriers the authority to charge the potentially higher just and reasonable rates, in order to limit subsidization and to encourage investment by the competitors. To allow the states to require the lower TELRIC rates directly conflicts with, and undercuts, the FCC's orders").

3. Petitioners do not offer any persuasive policy reasons in support of their attempt to obtain entrance facilities at TELRIC rates and fail to reconcile the clash between their position and the Act's policies. Instead, they rely on an implausible reading of words in FCC orders. In claiming that the duty in § 251(c)(2) to "provide . . . interconnection" includes a requirement to lease a transport facility spanning the distance between two networks, petitioners do not address the fact that the FCC's definition of "interconnection" expressly excludes "transport."[22] 47 C.F.R. § 51.5; AT&T Br. at 27. Related to this oversight, petitioners also fail to recognize that there is a fundamental difference between entrance facilities and the "interconnection facilities" that incumbents provide under § 251(c)(2).

As the Sixth Circuit explained, entrance facilities span the entire distance between a CLEC's switch and an ILEC's switch, which can be many miles.[23] By contrast, interconnection facilities are equipment within an ILEC's central office to which the competitor's entrance facility attaches.[24] ILECs perform a variety of tasks within their central offices, including providing cross-connect cables and conduit, to accommodate the interconnection of CLECs' entrance facilities. This equipment used to interconnect entrance facilities – which generally are provided at TELRIC prices and would continue to be under the Sixth Circuit's ruling – is distinct from the entrance facilities themselves.

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[22] Section 251(c)(2) requires incumbents to "provide, for the facilities and equipment of any requesting telecommunications carrier, interconnection with the [incumbent] local exchange carrier's network . . . at any technically feasible point within the [incumbent] carrier's network." 47 U.S.C. § 251(c)(2).

This distinction directly undercuts petitioners' attempt to obtain entrance facilities at TELRIC rates. As demonstrated above, the FCC has found conclusively that entrance facilities are available from multiple sources and that there is a competitive market for them. By contrast, competitive markets do not exist for the interconnection facilities used to attach entrance facilities to ILECs' networks, because those facilities are contained entirely within the ILECs' central offices. Petitioners' position blurs these critical differences between entrance facilities and "interconnection facilities." The former are non-bottleneck facilities and, as such, should not be governed by TELRIC pricing.

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[23] *Michigan Bell Telephone Co.*, 597 F.3d at 372 ("But, just to be clear, an "entrance facility" is really just a fancy name for a cable or wire used to transport calls from a CLEC switch to an ILEC switch, and this wire can be very short (if the two switches are close together), or it can be very long, stretching for blocks or even miles (if the switches are far apart), depending on the relative locations of the two switches").

[24] *Michigan Bell Telephone Co.*, 597 F.3d at 373-74 & n.4, 386.

B. The Act's Pricing Provision Confirms that Section 251(c)(2) does not Impose a Network Element Leasing Obligation

Petitioners' attempt to obtain entrance facilities at TELRIC rates also presumes incorrectly that the duty to interconnect established by § 251(c)(2) provides a means separate from § 251(c)(3) for CLECs to lease network elements. Nothing in § 251(c)(2) suggests that an ILEC's obligation to "provide . . . interconnection" includes a facilities leasing duty. Section 251(c)(2) only obligates ILECs to allow CLECs to connect their equipment to a point within the incumbent's network, not to lease any facilities. *See* AT&T Br. at 20-25.

This conclusion is also supported by 47 U.S.C. § 252(d)(1), which establishes the pricing standard for both the interconnection duty in § 251(c)(2) and the network unbundling duty in § 251(c)(3). Addressing pricing for the unbundling duty, § 252(d)(1) expressly applies to the "rate for [the] network elements" that ILECs must lease to CLECs. By contrast, addressing the interconnection duty, § 252(d)(1) applies to the "rate *for* the interconnection *of* facilities and equipment," without referring at all to rates for any facilities or equipment that ILECs are (in petitioners' view) required to lease to CLECs. This contrast further confirms that Congress did not intend in § 251(c)(2) to require ILECs to lease facilities and equipment.

and that the leasing obligation is contained only in § 251(c)(3).

Given the Act's clear distinction between the duty to lease network elements under §251(c)(3) and the obligation to "provide . . . interconnection" under §251(c)(2), it is not surprising that CLECs never claimed before the *TRO* that they had a right to lease entrance facilities under §251(c)(2). That argument came into fashion only after the FCC definitively ruled in the *TRRO* that ILECs are no longer required to provide entrance facilities under § 251(c)(3). As the timing suggests, this new argument was an opportunistic effort by some carriers to hang onto the below-cost TELRIC rates for entrance facilities that they had previously enjoyed.

In this regard, the CLECs' strategy was no different from their attempts to persuade state commissions and courts to apply TELRIC pricing to other network elements that the FCC has removed from the unbundling requirements of § 251(c)(3) but which certain ILECs (the regional Bell Operating Companies) are still required to provide under § 271 of the Act. While a few state commissions accepted that argument, the five courts of appeals that considered the claim unanimously rejected it.[25]

Writing for the Seventh Circuit in *Illinois Bell*, Judge Posner responded to this claim by emphasizing that consistent with the Act's objective of creating competitive markets, CLECs "are allowed to demand access at a price below the market price to [incumbent] carriers' facilities only to the extent necessary to prevent those carriers from using their facilities to throttle their competitors." *Illinois Bell*, 548 F.3d at 611-12. It is therefore only "bottleneck facilities," he explained, that CLECs can demand access to at below-market rates. *Id.* at 612. Other non-bottleneck network elements to which an incumbent provides access "can be priced at the market price." *Id.* at 613.

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[25] See, e.g., *Quest Corp.*, 567 F.3d 1109, 1116 (9th Cir. 2009) (collecting cases); *Illinois Bell Tel. Co.*, 548 F.3d at 612-13 (Posner, J.); *Verizon New England, Inc.*, 509 F.3d at 7-9.

The First Circuit, per then-Chief Judge Boudin, similarly found that for network elements the FCC has removed from the unbundling requirements of §251(c)(3), incumbents have "the authority to charge the potentially higher just and reasonable rates, in order to limit subsidization and to encourage investment by the competitors." *Verizon New England, Inc.*, 509 F.3d at 9. The court ruled that "requir[ing] the lower TELRIC rates directly conflicts with, and undercuts, the FCC's orders" and is preempted." *Id.*

Here, just as in *Illinois Bell*, *Verizon New England*, and the similar decisions from the other courts of appeals, this case is, at bottom, an attempt by CLECs to obtain at a below- market rate a network element for which the FCC has found no impairment. As these decisions hold, that result would conflict with federal law.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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AMICUS CURIAE BRIEF

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Nos. 10-313, 10-329

In the Supreme Court of the United States

TALK AMERICA, INC., PETITIONER,
V.
MICHIGAN BELL TELEPHONE COMPANY, D/B/A AT&T
MICHIGAN, RESPONDENT.

ORJIAKOR ISIOGU, *ET AL.*, PETITIONERS,
V.
MICHIGAN BELL TELEPHONE COMPANY, D/B/A AT&T
MICHIGAN, RESPONDENT.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR *AMICUS CURIAE* COMPTEL IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE*[1]

COMPTEL is the leading national trade association representing communications service providers and their supplier partners. COMPTEL's members provide local exchange telecommunications services in competition with incumbent local exchange carriers ("ILECs") including Respondent Michigan Bell Telephone Company. COMPTEL's members must interconnect their networks with the networks of the ILECs in order for their customers to be able to make calls to and receive calls from customers of the ILECs. COMPTEL's members purchase entrance facilities – *e.g.*, transmission links -- from the ILECs in order to interconnect their networks with the ILECs' networks for the purpose of exchanging traffic. As a result, COMPTEL and its members have a significant interest in the question presented in this case which concerns the obligation of the ILECs under 47 U.S.C. § 251(c)(2) to make entrance facilities available to requesting carriers for interconnection purposes at cost-based rates.

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[1] Pursuant to Rule 37.6, COMPTEL hereby certifies that no counsel for a party authored this brief in whole or in part and that no person or entity other than *amicus* COMPTEL has made a monetary contribution to fund the preparation or submission of this brief. Pursuant to Rule 37.3, COMPTEL certifies that counsel of record for all parties have consented to its filing in letters on file with the Clerk's office submitted herewith.

SUMMARY OF ARGUMENT

Sections 251(c)(2) and 251(c)(3) of the Communications Act (the "Act"), 47 U.S.C. §§ 251(c)(2), 251(c)(3), impose two different and discrete obligations on ILECs. Pursuant to Section 251(c)(2), ILECs are required to provide requesting carriers interconnection to their networks for the transmission and routing of telephone exchange (local) and exchange access (toll) services. Pursuant to Section 251(c)(3), ILECs are required to provide requesting carriers access to their network elements on an unbundled basis for the provision of telecommunications services to the carriers' customers if the failure to provide such access would impair the carriers' ability to provide a service. ILECs are required to charge cost-based rates both for interconnection facilities and for unbundled network elements. 47 U.S.C. §252(d)(1).

Entrance facilities are the physical transmission links connecting ILEC networks with the networks of competitive local exchange carriers ("CLECs"). The Sixth Circuit read the Federal Communications Commission's ("FCC") rule[2] limiting requesting carriers' rights to access entrance facilities on an unbundled basis pursuant to Section 251(c)(3) of the Act to eliminate their rights to obtain entrance facilities for the transmission and routing of telephone exchange and exchange access service pursuant to Section 251(c)(2) of the Act. This reading cannot be reconciled with the plain language of the statute. It is also at odds with the FCC's rules implementing the statute and the agency's interpretation of those rules, to which the Sixth Circuit accorded no deference in contravention of the precedent of this Court. Confronted with the same issue, the Seventh, Eighth and Ninth Circuits all properly deferred to the FCC's interpretation of the rights and obligations of telecommunications carriers under the Act and the rules. The Court should reverse the Sixth Circuit's decision and correct its clear misconstruction of the statute and the FCC's rules.

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[2] 47 C.F.R. § 319(e)(2)(i).

ARGUMENT

The Michigan Public Service Commission correctly determined that Respondent Michigan Bell is obligated under Section 251(c)(2) of the Act, 47 U.S.C. § 251(c)(2), to make entrance facilities used for interconnection purposes available to competitive local exchange carriers ("CLECs") at total element long run incremental cost ("TELRIC") calculated in accordance with Section 252(d)(1) of the Act, 47 U.S.C. §252(d)(1). The Public Service Commission's ruling is consistent with the FCC's rules and precedent interpreting the Act as well as with the decisions of the three other circuit courts that have addressed the issue. The decision should have been upheld. In reaching the opposite conclusion – *i.e.*, that ILECs may charge their competitors whatever they want for entrance facilities used for interconnection purposes -- the Sixth Circuit improperly conflated the obligations imposed on ILECs by Section 251(c)(2) of the Act and with those imposed by Section 251(c)(3) of the Act. In failing to distinguish between the rights of CLECs to obtain TELRIC-priced access to entrance facilities used to exchange traffic with ILECs and the restrictions on their rights to obtain unbundled access to TELRIC-priced entrance facilities used for other purposes, the Sixth Circuit significantly pared back the interconnection duties Congress deemed necessary for ILECs to fulfill in an effort to ensure that telephone subscribers are able to call one another regardless of the identity of their service provider. The Sixth Circuit's decision, *Michigan Bell Telephone Co. v. Covad Communications Co.*, 597 F. 3d 370 (6th Cir. 2010), must be reversed.

I. The ILEC's Duties Under Section 251(c)(2) And Section 251(c)(3) Are Not The Same

Congress enacted the Telecommunications Act of 1996[3] to open local telephone markets to competition. *Verizon Communications, Inc. v. FCC*, 535 U.S. 467, 476 (2002). Prior to the passage of the Telecommunications Act, ILECs had the exclusive right to provide local telephone service in their territories and their ubiquitous networks were the only source of connections to customers. *Id.* at 490-491. To open the markets to competition and to facilitate competitive entry, Congress imposed certain obligations on the ILECs and granted certain rights to new entrants. Two of those rights and obligations are at the center of this dispute. Section 251(c)(2) of the Act imposes on ILECs the duty to provide requesting telecommunications carriers interconnection to their networks for the transmission and routing of telephone exchange service and exchange access at TELRIC rates. 47 U.S.C. §§251(c)(2), 252(d)(1). ILEC and CLEC networks must be interconnected in order for ILEC customers to be able to make calls to and receive calls from CLEC customers and for CLEC customers to be able to make calls to and receive calls from ILEC customers.

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[3] Pub.L. 104-104, 110 Stat. 56. The Telecommunications Act of 1996 was codified in various provisions of the Communications Act of 1934, as amended, 47 U.S.C §§151, *et seq.*, including Sections 251 and 252.

Section 251(c)(3) of the Act imposes on ILECs the duty to provide requesting telecommunications carriers, also at TELRIC rates, access to their network elements on an unbundled basis for the provision of telecommunications service. 47 U.S.C. §§251(c)(3), 252(d)(1). CLECs may combine the unbundled network elements they purchase from the ILECs with their own network facilities to provision service to their customers.

In determining which network elements ILECs are required to make available at TELRIC rates, Congress directed the FCC to consider whether the failure to provide unbundled access to a particular network element would impair the ability of a requesting carrier to provide service. 47 U.S.C. §251(d)(2). Although the FCC had originally determined that CLECs were entitled to purchase access to unbundled entrance facilities under Section 251(c)(3), it changed that assessment in 2005 when it found that CLECs were not impaired in providing telecommunications service without access to unbundled entrance facilities at TELRIC rates. At the same time, the FCC explained that its non-impairment determination under Section 251(c)(3) did not adversely affect the rights of CLECs to obtain TELRIC-priced entrance facilities for the transmission and routing of telephone traffic pursuant to Section 251(c)(2). *Unbundled Access To Network Elements And Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Order on Remand*, 20 FCC Rcd 2533 at 2611, ¶140 (2005) ("*TRRO*"), *petitions for review den.*, *Covad Communications Co. v. FCC*, 450 F.3d 528 (D.C. Cir. 2006). Unlike Section 251(c)(3), Section 251(c)(2) does not call for an impairment determination.

In ruling that CLECs are not entitled to TELRIC-priced entrance facilities for the purpose of interconnection, the Sixth Circuit failed to recognize that an ILEC's interconnection duty pursuant to Section 251(c)(2) is independent of its duty to provide access to unbundled network elements. The plain language of Section 251 makes clear that subsection (c)(2) (interconnection) and subsection (c)(3) (access to unbundled network elements) impose separate and distinct obligations on ILECs. The FCC's implementing regulations eliminate any doubt about the independence of the obligations. Section 51.307(b) of the FCC's rules states that the duty to provide access to unbundled network elements pursuant to Section 251(c)(3) "includes a duty to provide a connection to an unbundled network element *independent* of any duty to provide interconnection" pursuant to Section 251(c)(2) of the Act. 47 C.F.R. §51.307(b) (emphasis added). *See* *also*, *Pacific Bell Telephone Co. v. California Public Utilities Comm'n*, 621 F.3d 836, 845 (9th Cir. 2010) (duties of ILECs under Section 251(c)(2) are independent of duties under Section 251(c)(3)).

Despite the plain language of the statute and the rule as well as the FCC's reaffirmation in the *TRRO* that CLECs continue to have access to TELRIC-priced entrance facilities used for interconnection purposes, the Sixth Circuit applied the FCC's finding that CLECs are not *impaired* in providing telecommunications service without access to unbundled entrance facilities pursuant to Section 251(c)(3) to foreclose the independent right of CLECs to obtain access to entrance facilities for the transmission and routing of telephone traffic pursuant to Section 251(c)(2). In so doing, the Sixth Circuit impermissibly expanded the reach of §51.319(e)(2)(i) of the FCC's rules, 47 C.F.R. § 51.319(e)(2)(i). Section 51.319 is entitled "Specific Unbundling Requirements" and subsection (e)(2)(i) states that ILECs are not obligated to provide CLECs *unbundled access* to entrance facilities that do not connect a pair of ILEC wire centers. Section 51.319(e)(2)(i) was adopted to reflect the FCC's finding that CLECs are not impaired without access to unbundled entrance facilities in provisioning service to their customers. It was *not* intended to curtail CLECs' rights to obtain access to entrance facilities used to interconnect with the ILEC's network for the transmission and routing of telephone exchange and exchange access service. The Sixth Circuit's reading conflicts with the plain language of the rule which by its terms is limited to unbundling requirements.

II. The Sixth Circuit Substituted Its Judgment For That Of The Expert Agency

The Sixth Circuit's analysis of the rights and obligations of ILECs and CLECs under Section 251(c) does not withstand scrutiny. In addition to running counter to the decisions of the three other circuit courts that have considered the issue,[4] the Sixth Circuit reached its decision by substituting its own judgment for that of the expert agency not only with respect to the manner in which telephone networks are designed and operate but also with respect to the meaning of the expert agency's own regulations.

As this Court has recognized, ascertaining the meaning of the Telecommunications Act of 1996 often presents challenges. Congress has delegated to the FCC the authority to resolve any ambiguities.

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[4] *Pacific Bell Telephone Co. supra*; *Southwestern Bell Telephone, L.P. v. Missouri Public Service Comm'n.*, 530 F. 3d 676 (8th Cir. 2008), *cert. denied*, 129 S. Ct. 971 (2009); *Illinois Bell Telephone Co. v. Box*, 526 F. 3d 1069 (7th Cir. 2008).

The FCC's interpretations of the rights and duties of carriers under the Act are entitled to deference so long as they are reasonable:

> It would be a gross understatement to say that the 1996 Act is not a model of clarity. It is in many important respects a model of ambiguity or indeed even self-contradiction. This is most unfortunate for a piece of legislation that profoundly affects a crucial segment of the economy worth tens of billions of dollars. The 1996 Act can be read to grant (borrowing a phrase from incumbent GTE) "most promiscuous rights" to the FCC vis-à-vis the state commissions and to competing carriers vis-à-vis the incumbents – and the Commission has chosen in some instances to read it that way. But Congress is well aware that the ambiguities it chooses to produce in a statute will be resolved by the implementing agency. We can only enforce the clear limits that the 1996 Act contains. . . .

AT&T Corp. v. Iowa Utilities Board, 525 U.S. 366, 397 (1999). *See also*, *National Cable & Telecommunications Ass'n. v. Brand X Internet Services*, 545 U.S. 967, 980 (2005) (ambiguities in a statute within an agency's jurisdiction to administer are delegations of authority to fill the statutory gap and courts should accept the agency's construction so long as it is reasonable).

Fifteen years ago, the FCC wisely concluded that national rules for interconnection pursuant to Section 251(c)(2) are necessary to promote Congress' goal of "creating conditions that will facilitate the development of competition in the local exchange market." *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, First Report and Order*, 11 FCC Rcd 15499, 15591-92 at ¶ 179 (1996), *reversed in part on other grounds*, *AT&T v. Iowa Utilities Board*, 525 U.S. 366 (1999) (*"Local Competition Order"*). The term "interconnection" is not defined in the Act. The FCC's interpretation of the term is therefore entitled to considerable weight and the deference of the reviewing court so long as it is reasonable. *Competitive Telecommunications Ass'n. v. FCC*, 117 F. 3d 1068, 1071 (8th Cir. 1997).

Section 51.5 of the FCC's rules, 47 C.F.R. §51.5, defines interconnection as the "linking of two networks for the mutual exchange of traffic" and defines "equipment necessary for interconnection" for purposes of Section 251(c)(2) as the equipment used to interconnect with the ILEC's network for the transmission and routing of telephone exchange service, exchange access service or both. The FCC has found that Section 251(c)(2) expressly requires

ILECs to provide access to the transmission facilities CLECs need in order to interconnect with the ILEC network. *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Report and Order on Remand and Further Notice of Proposed Rulemaking*, 18 FCC Rcd 16978, 17203 at ¶ 366 (2003) ("*TRO*"), *vacated in part and remanded in part on other grounds, United States Telecom Ass'n. v. FCC*, 359 F.3d 554 (D.C. Cir 2004).

Interconnection of networks for the purpose of exchanging traffic is an arrangement that benefits both the ILEC and the CLEC equally by allowing each of their respective customers to make calls to and receive calls from the customers of the other. *Local Competition Order*, 11 FCC Rcd at 15781, ¶553; *Pacific Bell Telephone Co.*, 621 F. 3d at 847. In the *Local Competition Order*, the FCC explained that the Section 251(c)(2) interconnection duty requires ILECs "to design interconnection facilities to meet the same technical criteria and service standards, such as probability of blocking in peak hours and transmission standards, that are used within their own networks." 11 FCC Rcd. at 15614-15615, ¶ 224.

There is no dispute that entrance facilities are the physical transmission facilities -- usually fiber optic links with tremendous capacity -- that connect ILEC networks and CLEC networks. *Michigan Bell*

Telephone Co., 597 F. 3d at 372. What the Sixth Circuit failed to appreciate is that various types and jurisdictional classifications of communications traffic can and do ride a single entrance facility (on different virtual channels) and that what distinguishes the different types and jurisdictions of traffic is the regulatory treatment that each is accorded, not the physical facilities they traverse.

There is also no dispute that the FCC has determined pursuant to Section 251(c)(3) that CLECs are not impaired in providing telecommunications services to their customers without access to unbundled entrance facilities at TELRIC rates. This finding of non-impairment, however, does not eliminate the right of CLECs to obtain TELRIC-priced entrance facilities used for interconnection purposes pursuant to Section 251(c)(2). The FCC has explained the distinction between interconnection and access to unbundled network elements:

> [I]nterconnection is different from "access" to unbundled elements. . . . Section 251(c)(2) requires that interconnection be provided for the "transmission and routing of telephone exchange service and exchange access." Section 251(c)(3), in contrast, requires the provision of access to unbundled elements to allow requesting carriers to provide a "telecommunications service." The

> term "telecommunications service" by definition includes a broader range of services than subsection (c)(2) allows for interconnection. Subsection (c)(3), therefore, allows unbundled elements to be used for a broader range of services than subsection (c)(2) allows for interconnection. If we were to conclude that "access to unbundled network elements" pursuant to subsection (c)(3) could only be achieved by means of interconnection under subsection (c)(2), we would be limiting, in effect, the uses to which unbundled elements may be put, contrary to the plain language of Section 251(c)(3) and standard canons of statutory construction.

Local Competition Order, 11 FCC Rcd at 15636-37, ¶270.[5] Despite this explication of the differences in the services provided over Section 251(c)(2) facilities and Section 251(c)(3) facilities, the Sixth Circuit misconstrued the language of Section 251(c)(3) and the FCC's entrance facility unbundling rule to limit the interconnection rights of CLECs under Section 251(c)(2).

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[5] The Act defines "telecommunications service" as the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available to the public, regardless of the facilities used. "Telecommunications" in turn is defined as the transmission, between or among points specified by the user, of information of the user's choosing without change in the form or content of the information as sent and received. 47 U.S.C. §§153(43), (46)

There is no basis for the Sixth Circuit's conclusion that entrance facilities -- that is, the physical transmission facilities connecting networks -- cannot be interconnection facilities even when they are used to interconnect an ILEC network and a CLEC network for the mutual exchange of traffic because "neither the FCC nor any court has ever defined interconnection" or "entrance facility" by the use that is made of the transmission facility. *Michigan Bell Telephone Co.*, 597 F.3d at 383-384. The Sixth Circuit is mistaken. The FCC does in fact define the regulatory treatment of transmission facilities and whether they are priced at TELRIC rates or unregulated rates by the use that is made of those facilities. *See e.g.*, 47 C.F.R. §51.305(b) (carrier that requests interconnection *for a purpose other than providing telephone exchange service and/or exchange access service* to others not entitled to TELRIC priced interconnection pursuant to Section 251(c)(2)); 47 C.F.R. §307(a) (ILEC shall provide unbundled access to network elements *for the provision of a telecommunications service*); 47 C.F.R. §51.309(b) (a requesting carrier may not access an unbundled network element *for the exclusive provision of mobile wireless service or interexchange* *service).*[6] *See also, Competitive Telecommunications Ass'n. v. FCC,* 117 F. 3d at 1071-1072. ("Congress intended for 'the transmission and routing of telephone exchange and exchange access' only to describe what the interconnection, the physical link, would be *used* for.")[7]

Consistent with industry practice, the FCC has long recognized that CLECs use the "transmission connections between incumbent LEC networks and their own networks both for interconnection and to backhaul traffic" and that Section 251(c)(2) applies only to the former use. *TRO,* 18 FCC Rcd at 17203, ¶365. If the physical transmission link is used for the transmission and routing of telephone exchange or exchange access traffic between the ILEC and the CLEC, the CLEC is entitled to TELRIC pricing. If the CLEC uses the physical transmission link to reach its collocation space in the ILEC's wire center and access unbundled network elements or to transport calls between its own customers, the CLEC is not entitled to TELRIC pricing.

The FCC acted well within its authority in interpreting Section 251(c)(2) to require ILECs to make entrance facilities available for interconnection purposes at TELRIC rates regardless of whether Section 251(c)(3) requires ILECs to provide CLECs unbundled access to entrance facilities for the purpose of backhauling traffic or providing any other telecommunications service. *TRO,* 18 FCC Rcd. at 17203-05 ¶¶365-367 and nn. 1113 and 1117. In order to justify its conclusion that entrance facilities are not interconnection facilities subject to TELRIC rates even when they are used to connect an ILEC network and a CLEC network for the *transmission and routing of telephone exchange service,* the Sixth Circuit had to reject the expert agency's analysis with respect to the different uses telecommunications carriers make of entrance facilities and the different statutory rights and obligations that attach to those different uses of the facilities. *Michigan Bell Telephone Co.,* 597 F. 3d at 382-383.

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[6] Emphasis added.

[7] Emphasis added.

The Sixth Circuit found the FCC's interpretation of CLECs' interconnection rights under Section 251(c)(2) to be "so plainly erroneous or inconsistent with the regulation" as to warrant no deference. *Michigan Bell Telephone,* 597 F.3d at 375. But the FCC's interpretation is neither erroneous nor inconsistent with any regulation. The purported inconsistency the court found was with 47 C.F.R. §51.319(e)(2)(i) of the FCC's rules, the *unbundling* regulation that very clearly states that ILECs are not required pursuant to Section 251(c)(3) to provide unbundled access to entrance facilities that do not connect a pair of ILEC wire centers. *Michigan Bell Telephone Co.*, 570 F. 3d at 382. As noted, when the FCC adopted this regulation in 2005, it contemporaneously clarified that its finding pursuant to Section 251(c)(3) that CLECs were not impaired without access to unbundled entrance facilities used to provide telecommunications services does not affect the right of CLECs pursuant to Section 251(c)(2) to obtain TELRIC-priced entrance facilities to the extent that they use them to interconnect with the ILEC's network for the mutual exchange of traffic. *TRRO*, 20 FCC Rcd 2533 at 2609-2612, ¶¶ 136-140.

The FCC's reaffirmation of CLECs' rights to entrance facilities used for interconnection purposes at TELRIC rates under Section 251(c)(2) of the Act is not plainly erroneous or inconsistent either with the statute or with its finding that CLECs may not obtain unbundled access to entrance facilities at TELRIC rates when they use them for other purposes, including backhauling their own traffic. The FCC's interpretation of the scope of §51.319(e)(2)(i) and its impact on the interconnection rights of CLECs under Section 251(c)(2), therefore, is entitled to deference. *Coeur Alaska, Inc. v. Southeast Alaska Conservation Council*, 129 S. Ct. 2458 (2009). By declining to defer to the FCC's interpretation, the Sixth Circuit improperly substituted its construction of the statute and the FCC's implementing regulation for that of the FCC in a very technical area. *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 844 (1984).

In an effort to reconcile its reading of §51.319(e)(2)(i) of the FCC's regulations with the explanatory language in the *TRRO*, the court rephrased the pertinent provisions of the rule and the *TRRO* to say that ILECs are not required to provide entrance facilities at TELRIC rates under any circumstances. *Michigan Bell Telephone*, 597 F.3d at 379. The Sixth Circuit erroneously turned a blind eye to the fact that the regulation does not speak to the ILECs' obligation to provide entrance facilities for interconnection purposes pursuant to Section 251(c)(2) of the Act, much less relieve ILECs of that obligation. The three other circuit courts that have addressed the issue of the interplay between §51.319(e)(2)(i) of the regulations and Section 251(c)(2) of the Act have properly sustained the FCC's interpretation of the statute and its own regulations. *Pacific Bell Telephone Co.*, 621 F. 3d at 846-47 (FCC's interpretation that Section 251(c)(2) requires ILECs to lease entrance facilities at TELRIC rates to CLECs for interconnection purposes is reasonable and entitled to deference); *Southwestern Bell Telephone, L.P. v. Missouri Public*

Service Commission, 530 F.3d 676 683-84 (8th Cir. 2008) (state commission properly read FCC rules to mean that ILECs must provide CLECs access to entrance facilities at TELRIC rates if necessary for interconnection); *Illinois Bell Telephone Co. v. Box*, 526 F. 3d 1069, 1072 (7th Cir. 2008) (federal law requires that entrance facilities used for interconnection must be priced at TELRIC). The Sixth Circuit should have done the same.

CONCLUSION

For the foregoing reasons and those set forth in the Petitioners' briefs, COMPTEL respectfully requests that the Court reverse the Sixth Circuit's decision.

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TALK AMERICA INC., PETITIONER

v.

MICHIGAN BELL TELEPHONE CO.,
D/B/A AT&T MICHIGAN

ORJIAKOR N. ISIOGU, COMMISSIONER, MICHIGAN PUBLIC
SERVICE COMMISSION, ET AL., PETITIONERS

v.

MICHIGAN BELL TELEPHONE CO.,
D/B/A AT&T MICHIGAN

ON WRITS OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF FOR SPRINT NEXTEL CORPORATION AS AMICUS CURIAE SUPPORTING PETITIONERS

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In the Supreme Court of the United States

No. 10-313

TALK AMERICA INC., PETITIONER

v.

MICHIGAN BELL TELEPHONE CO.,
D/B/A AT&T MICHIGAN

No. 10-329

ORJIAKOR N. ISIOGU, COMMISSIONER, MICHIGAN PUBLIC
SERVICE COMMISSION, ET AL., PETITIONERS

v.

MICHIGAN BELL TELEPHONE CO.,
D/B/A AT&T MICHIGAN

ON WRITS OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF FOR SPRINT NEXTEL CORPORATION AS AMICUS CURIAE SUPPORTING PETITIONERS

INTEREST OF AMICUS CURIAE

Sprint Nextel Corporation (Sprint) is one of the largest communications providers in the United States. Serving more than 48 million customers, Sprint is the Nation's third-largest provider of wireless communications and one of the largest providers of wireline long-distance service. In conjunction with various cable companies, Sprint also provides local telephone service.

In all of those markets, Sprint heavily depends on the ability to connect to the networks of incumbent local exchange carriers—and, specifically, on the ability to connect its customers with customers of those incumbents. As a result, the price that incumbents charge for access to their networks—access that they alone control—is of paramount importance to Sprint. That is particularly true because Sprint's two primary competitors for wireless service own a majority of the Nation's incumbent carriers (and therefore control access to a substantial portion of the Nation's local telephone network). Payments to incumbents already constitute a significant cost of Sprint's services, and affirmance of the erroneous decision below would permit incumbents unilaterally to increase that cost, to the detriment of Sprint's customers and of competition in the telecommunications industry more generally. Accordingly, Sprint has a significant interest in the disposition of this case.[1]

STATEMENT

Sprint respectfully submits that the Court cannot meaningfully review the court of appeals' decision in this case without a full understanding of the technology of telephone networks and the statutory and regulatory framework applicable to the instant dispute. Sprint includes this statement in an effort to assist the Court in obtaining that understanding.

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[1] Pursuant to Rule 37.6, Sprint affirms that no counsel for a party authored this brief in whole or in part; no such counsel or a party made a monetary contribution to fund its preparation or submission; and no person other than Sprint or its counsel made such a monetary contribution. The parties have consented to the filing of this brief, and copies of their letters of consent are on file with the Clerk's Office.

1. A "local exchange" is simply a network that connects "terminals" (*e.g.*, telephones) in a particular locality. Each terminal is connected by means of a wire known as a "local loop" to a "switch." Switches route calls to their proper destinations. Switches were originally operated manually; an operator would take an incoming call, ask for its destination, and forward the call to that destination. Those days, of course, are long gone, and switches now operate automatically, based on signals that accompany the call. Calls typically travel through more than one switch before reaching their final destination; switches that connect to local loops are known as "local switches" or "end office switches," and they are generally housed in a building known as the "local office" or "end office."

A local switch either directs a call between two terminals that are connected to that switch, or (more commonly) aggregates calls that are ultimately destined for other switches into a single wire known as a "trunk." Just as a local loop transmits a single call between a terminal and a local switch, a trunk transmits numerous calls between a local switch and a "tandem switch." A tandem switch is a switch that is connected only to other switches; tandem switches are housed in a building known as a "tandem office."[2] When a call arrives at a tandem switch, it is directed to its next destination, which may be another tandem switch or a local switch. The call eventually reaches the appropriate local switch, which in turn routes the call to the destination terminal.

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[2] The term "central office" refers to any office that houses switches, including end offices and tandem offices.

See generally *Verizon Commc'ns Inc.* v. *FCC*, 535 U.S. 467, 489-490 (2002).

As the foregoing explanation illustrates, it is "easy to see" why a company that owns a local exchange—known as an "incumbent local exchange carrier" (ILEC)—would have an "almost insurmountable competitive advantage" absent regulatory intervention. *Verizon*, 535 U.S. at 490. A would-be competitor could not compete with the incumbent "without coming close to replicating the incumbent's entire existing network"—the cost of which would be extraordinary if not prohibitive, not least because the competitor would need to install local loops to every single residence and business in a given locality. *Ibid.* Because of its control of the local market, moreover, the incumbent could impose substantial fees as a condition of obtaining access or connecting to the incumbent's customers—or choose not to permit it at all. *Id.* at 490-491.

Until the early 1980s, nearly all of the local exchanges in the United States were controlled by the American Telephone & Telegraph Company (AT&T), which "possess[ed] overwhelming monopoly power" in the markets for local and long-distance services alike. *Verizon*, 535 U.S. at 480. Pursuant to a 1982 consent decree, AT&T's local telephone operations were broken up into seven regional Bell operating companies, known as the "Baby Bells." See *United States* v. *American Tel. & Telegraph Co.*, 552 F. Supp. 131 (D.D.C. 1982), aff'd, 460 U.S. 1001 (1983). Each of those companies, however, continued to have monopoly power in the region it controlled. See *Verizon*, 535 U.S. at 475-476.

2. The Telecommunications Act of 1996 (Act) was intended, *inter alia*, to "eliminate the monopolies enjoyed by the inheritors of AT&T's local franchises." *Verizon*, 535 U.S. at 476. The Act obligates an incumbent to

"share its network with competitors," which include "competitive local exchange carriers" (CLECs) and "commercial mobile radio service" (CMRS) providers. *AT&T Corp.* v. *Iowa Utils. Bd.*, 525 U.S. 366, 371 (1999).

The Act provides three primary means of promoting competition between incumbents and competitors. First, a competitor can simply buy and resell an incumbent's "telecommunications service"; the incumbent is required to provide that service to the competitor at wholesale prices. *Verizon*, 535 U.S. at 491; 47 U.S.C. 251(b)(1) and (c)(4). Second, a competitor can "interconnect its own facilities with the incumbent's network." *AT&T*, 525 U.S. at 371; 47 U.S.C. 251(a) and (c)(2). Third, a competitor can "lease certain of an incumbent's 'network elements.'" *Verizon*, 535 U.S. at 491; 47 U.S.C. 251(c)(3) and (d)(2). This case implicates the last two of those methods.

If a competitor opts to "interconnect its own facilities with the incumbent's network," *AT&T*, 525 U.S. at 371, Section 251(c)(2) of the Act obligates the incumbent to provide interconnection on "rates, terms, and conditions that are just, reasonable, and nondiscriminatory." 47 U.S.C. 251(c)(2)(B) and (D). The parties are permitted to negotiate those rates privately. If they are unable to reach agreement, the matter is referred for arbitration to the relevant state utility commission, which determines a rate "based on the cost * * * of providing the interconnection" plus a "reasonable profit." 47 U.S.C. 252(d)(1). The Federal Communications Commission (FCC or Commission) has established the methodology for determining that rate, which is known as the "total element long-run incremental cost" (TELRIC) rate. As the District of Columbia Circuit has explained, "TELRIC rates are akin to wholesale prices." *Covad Commc'ns Co.* v. *FCC*, 450 F.3d 528, 532 (2006). Thus, when a competitor exercises its statutory right to interconnect with the incumbent's network, the "wholesale" TELRIC rate sets the price that the competitor pays in the absence of an otherwise negotiated rate.[3]

If, however, a competitor chooses to "lease certain of an incumbent's 'network elements,'" *Verizon*, 535 U.S. at 491, the appropriate rate may be either the TELRIC rate or a higher rate. The appropriate rate turns on whether the particular "network element" at issue is an "unbundled network element." 47 U.S.C. 251(c)(3). If it is, then the TELRIC rate applies; if it is not, the incumbent may charge a higher rate of its choosing. The FCC determines whether a network element is "unbundled" by considering, *inter alia*, whether "failure to provide access to [the element]" would "impair" a competitor's ability to provide service. 47 U.S.C. 251(d)(2). Not surprisingly, competitors "favor widespread unbundling" because it would reduce their costs, but incumbents do not. *Covad*, 450 F.3d at 532.[4] Critically for purposes of

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[3] The FCC has stated, and the parties do not dispute, that incumbents' obligations under Section 251(c)(2) extend to both wireline and wireless competitors. See 47 C.F.R. 20.11; Br. in Opp. 18 n.21.

[4] In *Covad*, the D.C. Circuit provided an illustration of the "unbundling" concept:

> Suppose a [competitor] (such as Covad) wants to serve customers in Washington, D.C. One way of doing so is for Covad to purchase its own switches, trunks, and loops, which it can then use to offer service to its new customers. However, given that the local [incumbent] (*e.g.*, Verizon) has already deployed switches, trunks, and loops to serve the market, it might be economically impossible for Covad to duplicate competitively Verizon's infrastructure. Through regulatory unbundling, however, Covad might be able to lease Verizon's switches, trunks, and loops as [unbundled network elements]. Covad could then use

this case, the "impairment" test applies only to a competitor's efforts to lease certain network elements under Section 251(c)(3), not to a competitor's efforts to interconnect its own facilities with the incumbent's network under Section 251(c)(2). Regardless of whether a competitor can obtain access to individual network elements at TELRIC rates, therefore, the competitor retains the right to interconnect its network to an incumbent's network at those lower rates. See *AT&T*, 525 U.S. at 371.

Following the Act's passage in 1996, a protracted dispute ensued between competitors and incumbents over the meaning of "impairment" for purposes of Section 251(c)(3). Competitors argued for a broader interpretation of that term, such that more network elements would be considered "unbundled" and thus available to them on an individual basis at TELRIC rates; incumbents argued for a narrower interpretation. The FCC's first two efforts to define "impairment" were invalidated—first by this Court, see *AT&T*, 525 U.S. at 387-392, and then by the D.C. Circuit, see *United States Telecom Ass'n* v. *FCC*, 290 F.3d 415, 421-428 (D.C. Cir. 2002) (*USTA I*), cert. denied, 538 U.S. 940 (2003).

3. In the meantime, following the Act's passage, competitors began invoking the Act in efforts to compete with incumbents. As is relevant here, those efforts fell into two basic paradigms.

First, some competitors elected to build their own networks—*i.e.*, their own switches along with wires between those switches and their customers' terminals. Such a competitor had no need to lease network ele-

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combinations of [unbundled network elements] to cobble together a network and compete against Verizon in Washington.

450 F.3d at 532.

ments of the incumbent's network, but it did still need *access* to the incumbent's network (so that its customers could call the incumbent's, and vice versa). The physical means of connecting two networks is through a "facility": *viz.*, a medium such as a fiber-optic cable through which communications are transmitted. As a general matter, such "facilities" existed even before the Act (*e.g.*, to provide long-distance providers with access to the incumbent's local exchange network, and vice versa), and were often added by the incumbents themselves to meet additional demand (*e.g.*, to accommodate population growth in a particular locality). After the Act, a competitor seeking access to an incumbent's network could obtain it simply through a single strand (potentially one of thousands) of the fiber-optic cable stretching from one of its switches to one of the incumbent's switches. If the customer of one of those competitors called an incumbent's customer, the call would travel (1) through the competitor's network to the competitor's switch; (2) across the connecting facility to the incumbent's switch; and (3) through the incumbent's network to its final destination. See 10-329 Pet. Br. 23 (depicting a call from CLEC Customer C to ILEC Customer A).

Second, some competitors sought to lease elements of incumbents' networks, rather than build particular pieces of their own network. For example, such a competitor might lure a local telephone customer away from the incumbent—and, in so doing, still need to lease the local loop that formerly connected the customer with the incumbent's local office. If that former customer of the incumbent called one of the incumbent's current customers, the call would not simply pass through the incumbent's local switch and then directly onward to its final destination along the incumbent's network, as it did before. Instead, it would terminate at a "collocation" site, a portion of the incumbent's local office which the competitor leases and in which it places its own equipment to aggregate the local loops it controls. See 47 C.F.R. 51.5. From the collocation, the call would travel onward to another collocation at the incumbent's tandem office and then to one of the competitor's switches. Only at that point would the call travel from the competitor's switch across to one of the incumbent's switches and, via the incumbent's network, on to its final destination. See 10-329 Pet. Br. 23 (depicting a call from CLEC Customer B to ILEC Customer A).

There is one crucial distinction between the two paradigms we have just discussed. In the first paradigm, only one "facility" is used, and it connects the competitor's network to the incumbent's network (specifically, a competitor's switch to an incumbent's switch). In the second paradigm, however, two "facilities" are used: one to connect the competitor's collocation at the tandem office to one of the competitor's own switches, and the other (as in the first paradigm) to connect the competitor's network to the incumbent's network. Those "facilities" may in fact be two strands in the same fiber-optic cable, because the call may effectively double back on itself when it travels from the collocation in the incumbent's tandem office to the competitor's switch and then back to the incumbent's switch in the same tandem office. But they are unquestionably separate and distinct facilities, whose signals never cross and which serve different and dedicated functions. The facility common to both paradigms, which we shall call "Facility A," connects a competitor's network to the incumbent's network for the purpose of exchanging traffic between the two networks; the other, which we shall call "Facility B," actually connects one component of the competitor's network (the competitor's collocation) to another component of the competitor's network (the competitor's switch), for a purpose known as "backhauling."

Competitors took advantage of both of these paradigms. The first paradigm describes wireless providers such as Sprint (which have their own network infrastructure in the form of towers and switches), as well as cable companies providing local telephone service (which employ their own wires and facilities to reach end users). Customers of these entities are completely outside the incumbent's network; as such, a provider need only have the ability to connect its network to an incumbent's network and to transmit its customers' calls to an incumbent's customers—thus requiring only one facility (Facility A). By contrast, a competitor for local telephone service that uses portions of the incumbent's network to provide that service will often have customers *within* the incumbent's network. For those customers, the competitor requires *two* facilities: one to "backhaul" a call out from the customer to the competitor's switch (Facility B), and another to connect to the incumbent's network and transmit the call to an incumbent's customer (Facility A).

4. In 2003, after its first two efforts to define "impairment" were invalidated, the FCC issued its third set of rules on the issue. See *In re Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 18 F.C.C.R. 16,978 (2003) (*Triennial Review Order* or *TRO*). In addition to setting forth a new interpretation of the impairment standard, the FCC made a series of findings critical to this case. As is relevant here, the FCC undertook to define which types of "dedicated interoffice transmission facilities," or "dedicated transport," should be considered unbundled. As the name suggests, an "interoffice transmission facility" is a facility (again, such as a strand of fiber-optic cable) that

carries traffic between two offices in a network; a "dedicated" facility is simply one that is used by a single provider. *TRO*, 18 F.C.C.R. at 17,201 (¶ 361).

Before determining whether particular types of "dedicated transport" qualified as unbundled elements under its new impairment standard, the FCC first had to decide what exactly constituted "dedicated transport." In a reversal of a prior position, the FCC determined that it understood "dedicated transport" to include only facilities between an incumbent's own switches. *TRO*, 18 F.C.C.R. at 17,202 (¶ 362). Significantly, the FCC noted that competitors "require a transmission link from * * * the incumbent LEC network to their own equipment located elsewhere." *Id.* at 17,203 (¶ 365). According to the FCC, competitors "use these transmission connections between incumbent LEC networks and their own networks *both* for interconnection *and* to backhaul traffic." *Ibid.* (emphases added). The FCC reasoned that, "[u]nlike the facilities that incumbent LECs explicitly must make available for [S]ection 251(c)(2) interconnection [*i.e.*, Facility A in the examples discussed above], * * * the Act does not require incumbent LECs to unbundle transmission facilities connecting incumbent LEC networks to competitive LEC networks *for the purpose of backhauling traffic* [*i.e.*, Facility B]." *Ibid.* (emphasis added; footnote omitted).

The FCC ultimately determined that the latter type of transmission facilities—*i.e.*, facilities used for backhauling, or Facility B—"exist *outside* the incumbent LEC's local network" and therefore "are not appropriately included in the definition of dedicated transport." *TRO*, 18 F.C.C.R. at 17,203 (¶ 366). At the same time, however, the FCC noted that, "to the extent that requesting carriers need facilities in order to 'interconnect[] with the [incumbent's] network,'" *i.e.*, Facility A, "[S]ection 251(c)(2) of the Act expressly provides for this and we do not alter the Commission's interpretation of this obligation." *Id.* at 17,204 (¶ 366) (first alteration in original).

The FCC supported its determination that facilities used for backhauling do not qualify as "dedicated transport" by discussing the economics of those facilities. See *TRO*, 18 F.C.C.R. at 17,204 (¶ 367). The FCC explained at length why "backhaul facilities" are different from transport facilities that are entirely within an incumbent's network, citing the greater control of competitors over the design and placement of backhaul facilities and the potential for cost savings if competitors deploy those facilities themselves. *Ibid.*

In determining that facilities used for backhauling do not qualify as "dedicated transport," the FCC stated in a footnote that its determination "effectively eliminates 'entrance facilities' as [unbundled network elements]" under Section 251(c)(3). *TRO*, 18 F.C.C.R. at 17,204 n.1116 (¶ 366 n.1116). The FCC reiterated, however, that "all telecommunications carriers * * * will have the ability * * * to interconnect for the transmission and routing of telephone exchange service and exchange access, pursuant to [S]ection 251(c)(2)." *Id.* at 17,206 (¶ 368). The FCC thus indicated that interconnection facilities such as Facility A could qualify for the TELRIC rate under Section 251(c)(2), even if not under Section 251(c)(3).

b. Once again, the D.C. Circuit invalidated the FCC's effort to define "impairment." See *United States Telecom Ass'n* v. *FCC*, 359 F.3d 554, 594-595 (D.C. Cir.) (*USTA II*), cert. denied, 543 U.S. 925 (2004). The D.C. Circuit briefly addressed the competitors' argument that the FCC had erred in determining that "entrance facilities" were not part of an incumbent's network in the first place (and thus could never be subject to TELRIC rates). See *id.* at 585-586. The court ultimately declined to rule on the merits of the FCC's determination, concluding that the record was "too obscure," and remanded the issue for further consideration. *Id.* at 586. The court added that, "[i]f entrance facilities are correctly classified as 'network elements,' an analysis of impairment would presumably follow." *Ibid.*

c. The FCC then issued a fourth set of rules on the "impairment" issue. See *In re Unbundled Access to Network Elements*, 20 F.C.C.R. 2,533 (2005) (*Triennial Review Remand Order* or *TRRO*). A short portion of those rules addressed the matter of "entrance facilities" that was previously covered in the *TRO* and *USTA II*. The FCC interpreted *USTA II* as holding that it had erred in excluding entrance facilities from the definition of "dedicated transport." *Id.* at 2,609-2,610 (¶ 136). The FCC therefore reinstated its prior view that "dedicated transport" included "entrance facilities"—and thus that those facilities could potentially qualify for the TELRIC rate under Section 251(c)(3). *Id.* at 2,610 (¶ 137).

Having concluded that "entrance facilities" were once again to be considered part of an incumbent's network, the FCC proceeded to determine whether the failure to provide access to those facilities would impair a competitor's ability to provide service, with the result that the facilities should be treated as unbundled network elements for purposes of Section 251(c)(3). *TRRO*, 20 F.C.C.R. at 2,610-2,612 (¶¶ 138-141). The FCC ultimately found that there would not be impairment, heavily relying on the subsidiary economic findings it had made with respect to "backhaul facilities" in the *TRO* and supporting those findings with evidence it had subsequently received. *Id.* at 2,610-2,611 (¶¶ 138-139). At the same time, as in the *TRO*, the FCC reiterated that its finding on impairment did not "alter the right of competitive LECs to obtain interconnection facilities pursuant to [S]ection 251(c)(2)"—and that such facilities were still available to competitors at TELRIC rates "to the extent that they require them to interconnect with the incumbent LEC's network." *Id.* at 2,611 (¶ 140).[5]

This time, the FCC's efforts were upheld in full. See *Covad Commc'ns Co.* v. *FCC*, 450 F.3d 528 (D.C. Cir. 2006). No party to that litigation challenged the FCC's determinations on "entrance facilities."

5. Following the *TRRO*, incumbents sought to revise the terms of their interconnection agreements with competitors, claiming that the *TRRO* entitled them to higher rates for facilities used for interconnection between their networks and those of competitors. Four federal courts of appeals have since reviewed decisions of state utility commissions on that question. Three of those courts held that, in determining in the *TRRO* that "entrance facilities" were not unbundled network elements, the FCC was referring only to facilities used for backhauling—and that facilities used for interconnection were subject to TELRIC rates under Section 251(c)(2). See *Illinois Bell Tel. Co.* v. *Box*, 526 F.3d 1069, 1071-1072 (7th Cir. 2008); *Southwestern Bell Tel., L.P.* v. *Missouri Pub. Serv. Comm'n*, 530 F.3d 676, 683-684 (8th Cir. 2008), cert. denied, 129 S. Ct. 971 (2009); *Pacific Bell Tel. Co.* v. *California Pub. Utils. Comm'n*, 621 F.3d 836, 843-847 (9th Cir. 2010). By contrast, notwithstanding an invited amicus brief from the FCC confirming that understanding, a divided Sixth Circuit held that incumbents could charge higher rates even for facilities used for in-

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[5] The FCC codified its finding that "entrance facilities" were not unbundled network elements at 47 C.F.R. 51.319(e)(2)(i).

terconnection. See 10-313 Pet. App. 1a-33a; *id.* at 33a-45a (Sutton, J., dissenting).

SUMMARY OF ARGUMENT

Although the technology and regulatory scheme at issue in this case are relatively complicated, the legal question at its core is not. The court of appeals' decision disregarding the FCC's own interpretation of its regulations cannot be justified under settled principles of agency deference. In two orders, the FCC made clear that, while facilities used for backhauling did not constitute unbundled network elements subject to TELRIC rates under Section 251(c)(3) of the Telecommunications Act of 1996, facilities used for interconnection were subject to TELRIC rates under Section 251(c)(2). The FCC made clear in each order that facilities used for interconnection were excluded from its analysis under Section 251(c)(3); the FCC's references to "entrance facilities" in the later order were plainly directed at backhaul facilities, rather than both categories of facilities. The FCC confirmed that understanding in an amicus brief before the court of appeals, and there is no valid basis for refusing to defer to the FCC's interpretation here.

Affirmance of the court of appeals' decision, moreover, would have enormously adverse consequences for competition in the telecommunications industry. The court of appeals' approach would run counter to the objectives of the Telecommunications Act, because it would permit incumbents unilaterally to exact higher prices for facilities used for interconnection and thereby undermine the ability of competitors to obtain access or connect to the incumbents' customers at cost-based rates. For Sprint, the consequences of permitting incumbents to charge those higher prices are particularly severe, because its two largest competitors in the wireless market also control a substantial portion of the Nation's local telephone network. If the court of appeals' decision is upheld, competition in the wireless market (and other markets across the telecommunications industry) will be undermined, and consumers disserved. This Court should reject the court of appeals' approach and hold that the FCC's interpretation is entitled to deference.

ARGUMENT

A. The Court Of Appeals' Decision Is Erroneous

The central question before the Court in this case is whether facilities used for interconnection are subject to TELRIC rates under Section 251(c)(2). In the decision under review, the Sixth Circuit held that incumbents could charge higher rates for those facilities. See 10-313 Pet. App. 1a-33a. That holding cannot be squared either with the FCC's findings concerning "entrance facilities" or with the FCC's own interpretation of its regulations.

1. a. In the *TRRO*, the FCC ultimately determined that "entrance facilities" should not be treated as unbundled network elements for purposes of Section 251(c)(3) of the Act. See 20 F.C.C.R. at 2,610-2,612 (¶¶ 138-141). It is clear both from the *TRRO* and from the earlier *TRO*, however, that the FCC's determination applied only to facilities used for "backhauling" traffic from one component of a competitor's network to another (*e.g.*, Facility B in the examples discussed above), and not to facilities used to interconnect a competitor's network with the incumbent's (*e.g.*, Facility A).

In the *TRO*, the FCC expressly distinguished between those two types of facilities. With regard to a backhaul facility such as Facility B, the FCC determined that the facility not only did not qualify as an unbundled network element for purposes of Section 251(c)(3), but did not even qualify as a network element subject to the "impairment" test for unbundling in the first place (because it did not constitute "dedicated transport"). See *TRO*, 18 F.C.C.R. at 17,203-17,204 (¶¶ 365-366). In the course of so determining, the FCC also signaled that, even if a backhaul facility did qualify as a network element subject to the "impairment" test, it would not qualify as an unbundled network element, because competitors would not be economically disadvantaged by supplying their own backhaul facilities (and thus would not be impaired if they could not access incumbent-supplied backhaul facilities at TELRIC rates). See *id.* at 17,204-17,205 (¶ 367). The exact reasoning for the FCC's determination, however, was irrelevant to the outcome: either way, backhaul facilities would not be subject to TELRIC rates under Section 251(c)(3). Critically for present purposes, the FCC made clear that its determination applied only to backhaul facilities such as Facility B and not to facilities used for interconnection such as Facility A, which were subject to TELRIC rates under Section 251(c)(2) regardless of whether there was impairment. See *id.* at 17,204, 17,206 (¶¶ 366, 368).

After the D.C. Circuit, in invalidating the *TRO*, cast doubt on the FCC's determination that backhaul facilities did not even qualify as network elements subject to the impairment test in the first place, the FCC expressly found in the *TRRO* (as it had signaled it would in the *TRO*) that those facilities would not qualify as unbundled network elements because there would not be impairment. See 20 F.C.C.R. at 2,610-2,612 (¶¶ 138-141). To be sure, in the *TRRO*, the FCC did not expressly refer to "backhaul facilities" as often as it did in the *TRO*; instead, it primarily spoke of "entrance facilities." But in finding that there would not be impairment, the FCC relied on the subsidiary economic findings it had made with respect to "backhaul facilities" in the *TRO*. See *id.* at

2,610-2,611 (¶¶ 138-139). In the concluding paragraph of the relevant section, moreover, the FCC cited a paragraph of the *TRO* that expressly identified the backhauling function. See *id.* at 2,612 n.396 (¶ 141 n.396) (citing *TRO*, 18 F.C.C.R. at 17,204 (¶ 367)). And the FCC again made clear that its determination applied only to backhaul facilities and not to facilities used for interconnection, which were subject to TELRIC rates under Section 251(c)(2). See *id.* at 2,611 (¶ 140).

In short, aside from the FCC's retreat from its earlier position that backhaul facilities did not even qualify as network elements subject to the impairment test in the first place, there is no meaningful distinction between the FCC's positions in the *TRO* and the *TRRO*. In the *TRO*, the FCC expressly made economic findings concerning "backhaul facilities." And although the FCC was less explicit in the *TRRO* that its discussion pertained only to "backhaul facilities," there was no need for it to be as explicit as it had been in the *TRO*. As is relevant here, the D.C. Circuit had cast doubt on only one proposition from the *TRO*—that backhaul facilities were not subject to the impairment test in the first place. Accordingly, in the *TRRO*, the only adjustment that the FCC needed to make was to rescind that determination, and there was little reason for the FCC to do anything more than to reiterate the remainder of its findings from the *TRO* in relatively summary fashion. When read together, therefore, the FCC's orders make clear that, although facilities used for backhauling are not subject to TELRIC rates under Section 251(c)(3), facilities used for interconnection are subject to TELRIC rates under Section 251(c)(2).

b. In its amicus brief before the court of appeals, the FCC confirmed the foregoing interpretation: *viz.*, that its determination for purposes of "unbundling" under

Section 251(c)(3) applies only to entrance facilities used for backhauling and that Section 251(c)(2) requires an incumbent to provide at TELRIC rates "facilities used for the physical linking of its network with the network of a competitive carrier." FCC C.A. Br. 20. An agency's interpretation of its own regulations is entitled to deference as long as it is not "plainly erroneous or inconsistent with the regulation[s]." *Auer* v. *Robbins*, 519 U.S. 452, 461 (1997) (internal quotation marks omitted), and such deference is amply warranted here.

As an initial matter, the most that can be said about the regulations and orders at issue is that they "do not give a definitive answer" to the question presented. *Coeur Alaska, Inc.* v. *Southeast Alaska Conservation Council*, 129 S. Ct. 2458, 2472-2473 (2009). In fact, as discussed above, the better view is that the FCC's orders themselves affirmatively indicate that facilities used for interconnection are subject to TELRIC rates under Section 251(c)(2). The *TRO* states that, "to the extent that requesting carriers need facilities in order to 'interconnect[] with the [incumbent's] network,' [S]ection 251 (c)(2) of the Act expressly provides for this." 18 F.C.C.R. at 17,204 (¶ 366) (first alteration in original). And it further states that "all telecommunications carriers * * * will have the ability * * * to interconnect for the transmission and routing of telephone exchange service and exchange access, pursuant to [S]ection 251(c)(2)." *Id.* at 17,206 (¶ 368). For its part, the *TRRO* reiterates that its finding of no impairment does not "alter the right of competitive LECs to obtain interconnection facilities pursuant to [S]ection 251(c)(2)"—and that such facilities were still available to competitors at TELRIC rates "to the extent that they require them to interconnect with the incumbent LEC's network." 20 F.C.C.R. at 2,611 (¶ 140). In light of those statements (and the extended discussion of "backhaul facilities" in the *TRO*), it certainly cannot be said that the FCC's regulations and orders unambiguously compel a contrary interpretation. Deference to the FCC's interpretation is therefore appropriate.[6]

There is no other valid basis for refusing to defer to the FCC's interpretation here. This is not a situation in which the regulation at issue simply "restate[s] the terms of the statute itself," such that an interpretation of the regulation is nothing more than an interpretation of the corresponding statutory provision. *Gonzales* v. *Oregon*, 546 U.S. 243, 257 (2006). Nor is this a situation in which the agency's position is simply "a '*post hoc*' rationalization' advanced * * * to defend past agency action against attack," because the FCC is not a party to these proceedings and no party is challenging any of its orders. *Auer*, 519 U.S. at 462 (brackets omitted) (quoting *Bowen* v. *Georgetown University Hospital*, 488 U.S. 204, 212 (1988)). Although the FCC has expressed its position in an amicus brief, "[t]here is simply no reason to suspect that the interpretation does not reflect the [FCC's] fair and considered judgment on the matter in question." *Ibid.*[7] Nor is this a situation in which the agency has taken inconsistent positions on the interpretive question at issue; the FCC has consistently held the view that facilities used for interconnection are subject to TELRIC rates under Section 251(c)(2). Cf. *Kennedy* v. *Plan Administrator for DuPont Sav. & Inv. Plan*, 129 S. Ct. 865, 872 & n.7 (2009) (deferring to an agency position expressed in an amicus brief notwithstanding that the position "ha[d] fluctuated"); *Long Island Care at Home, Ltd.* v. *Coke*, 551 U.S. 158, 171 (2007) (deferring to an agency position notwithstanding that the agency had "clearly struggled" with the relevant issue).

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[6] The FCC's regulation codifying its finding that "entrance facilities" are not unbundled network elements is not to the contrary. That regulation provides that "[a]n incumbent LEC is not obligated to provide a requesting carrier with unbundled access to dedicated transport that does not connect a pair of incumbent LEC wire centers." 47 C.F.R. 51.319(e)(2)(i). It does not speak to an incumbent's obligation to provide access to facilities for interconnection.

[7] As recently as earlier this Term, the Court has repeatedly deferred to an agency's interpretation of its own regulations even when they are stated in a legal brief. See, *e.g.*, *Chase Bank USA, N.A.* v. *McCoy*, No. 09-329, slip op. 12-16 (Jan. 24, 2011); *Kennedy* v.

Given the notorious complexity both of the underlying technology and of the applicable legal regime, see, *e.g.*, *USTA I*, 290 F.3d at 421-422 (noting the "extraordinary complexity of the Commission's task" in defining "impairment"); *AT&T*, 525 U.S. at 397 (describing the Act as "a model of ambiguity or indeed even self-contradiction"), this is the archetypal case in which deference to the views of an expert agency is appropriate. See 10-313 Pet. App. 36a (Sutton, J., dissenting). And because the FCC's interpretation is a "sensible and rational construction" that is consistent with the regulations at issue, *Coeur Alaska*, 129 S. Ct. at 2474, 2477, it is entitled to deference.

2. By contrast, the court of appeals' contrary interpretation cannot be reconciled with the FCC's orders. In response to the FCC's repeated statements in the *TRO* and the *TRRO* that facilities used for interconnection are subject to TELRIC rates under Section 251(c)(2), respondent contends that those statements merely refer to "pre-existing rights" under that provision. Br. in Opp.

Plan Adm'r for DuPont Sav. & Inv. Plan, 129 S. Ct. 865, 872 & n.7 (2009); *Riegel* v. *Medtronic, Inc.*, 552 U.S. 312, 328-329 (2008).

24. In respondent's view, a competitor's "right" to interconnection extends only to "non-network element equipment" such as "cross-connects" (*i.e.*, short cords that link two wires together), rather than "the entire facility spanning the distance between" a competitor's network and an incumbent's. *Id.* at 23; Resp. C.A. Br. 38-39 & n.22. Put another way, respondent defines an "interconnection facility" not as Facility A in its entirety, but rather as the very limited portion of Facility A between the point at which it enters the incumbent's tandem office and the point at which it interfaces with the incumbent's switch within that office.

That interpretation is critical to respondent's argument, for respondent is attempting to give some meaning to Section 251(c)(2)—as it must in light of the FCC's findings in the *TRO* and *TRRO*. But it is ultimately unpersuasive. To begin with, as the FCC noted in its amicus brief below, the FCC has "consistently found" that an incumbent "may be required to provide facilities that are used for the physical linking of the two networks" at TELRIC rates in order to fulfill its duty to interconnect under Section 251(c)(2), without suggesting that the incumbent can satisfy that obligation by providing only a portion of those facilities. FCC C.A. Br. 18. In fact, the FCC has indicated that an incumbent has an affirmative obligation to "build out * * * facilities" for interconnection under "meet point arrangements." *In re Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 F.C.C.R. 15,499, 15,780-15,781 (¶¶ 551-553) (1996), and has underscored the statutory obligation to provide for collocation of equipment necessary for interconnection, 47 C.F.R. 51.321(b). Those affirmative obligations are entirely inconsistent with respondent's interpretation, under which an incumbent would have only a passive obligation to provide the equivalent of a wall jack on the outside of its office for a competitor to plug in.

In addition, although respondent suggests that its interpretation reflects the "pre-existing" scope of Section 251(c)(2) before the *TRRO*, Br. in Opp. 24, no incumbent, to the best of Sprint's knowledge, has ever previously asserted that interpretation. And at least in the wake of the *TRO*, incumbents had every incentive to do so: if, as respondent now claims, TELRIC rates were available under Section 251(c)(2) only for the proverbial "last inch" of facilities used for interconnection, incumbents should have started making that argument as soon as the FCC determined in the *TRO* that at least some entrance facilities were not subject to TELRIC rates under Section 251(c)(3). But they do not appear to have done so. And to the extent respondent argues in the alternative that the *TRRO* somehow narrowed the extent to which competitors may obtain facilities for interconnection at TELRIC rates under Section 251(c)(2), one would expect the FCC to have specifically discussed such a narrowing, because, as Judge Sutton observed below, such a "novel analysis without comment" would be "surprising." 10-313 Pet. App. 38a-39a (dissenting opinion). The FCC did not address the issue, and there is therefore no reason to believe that the FCC suddenly adopted respondent's interpretation.

That interpretation, moreover, is affirmatively inconsistent with the FCC's findings in the *TRO*. In determining that certain facilities did not qualify as a network elements subject to the "impairment" test for unbundling, the FCC repeatedly discussed the economics of "backhaul facilities." *E.g.*, 18 F.C.C.R. at 17,204 (¶ 366). When the FCC distinguished those facilities from facilities that are used for interconnection under Section 251(c)(2), the FCC in no way suggested that TELRIC rates would not be available under Section 251(c)(2) for the *entirety* of the latter facilities. See *id.* at 17,204, 17,206 (¶¶ 366, 368). Indeed, it may have been for that reason that incumbents do not appear to have asserted respondent's proposed interpretation in the wake of the *TRO*.

In the court of appeals, respondent sought to explain away the *TRO* by arguing that it "did not survive review in the D.C. Circuit." Resp. C.A. Br. 24. But that is a gross oversimplification: the D.C. Circuit did not opine on the scope of the interconnection duty under Section 251(c)(2), but merely cast doubt on the FCC's determination that "entrance facilities" did not qualify as network elements subject to the "impairment" test in the first place. See *USTA II*, 359 F.3d at 586. In response, the FCC simply reverted to its prior view that those facilities were subject to that test, but would not qualify as unbundled network elements because there would not be impairment—and, in so doing, relied on the same economic findings it had made in the *TRO* in the specific context of backhauling. See 20 F.C.C.R. at 2,610-2,612 (¶¶ 138-141). Because the FCC consistently took the position in the *TRO* and the *TRRO* that facilities used for interconnection are subject to TELRIC rates in their entirety under Section 251(c)(2), respondent is in essence collaterally attacking the validity of those orders in this proceeding—which it is not permitted to do. See 28 U.S.C. 2342.

In short, because the court of appeals' interpretation cannot be reconciled with the FCC's orders and fails to afford sufficient deference to the FCC's interpretation of those orders, it should be rejected.

B. If Adopted By This Court, The Court Of Appeals' Approach Would Harm Competition In The Telecommunications Industry

A rule that exempts incumbent carriers from providing competitors with entrance facilities for interconnection at TELRIC rates would have profound and adverse consequences for competition in the telecommunications industry. If adopted by the Court, that rule would impose substantial costs on competitors, promote the inefficient use of resources, and work to the disadvantage of consumers who reap the benefits of competition and innovation in the industry. For that reason, too, the court of appeals' approach should be rejected.

1. As the Court will be aware, the overarching purpose of the Telecommunications Act of 1996 was to "promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies." Pub. L. No. 104-104, 110 Stat. 56, preamble (1996). The Act's legislative history confirms that the Act was intended to "provide for a pro-competitive, deregulatory national policy framework designed to accelerate rapid[] private sector deployment of advanced * * * technologies and services * * * by opening all telecommunications markets to competition." H.R. Conf. Rep. No. 458, 104th Cong., 2d Sess. 113 (1996).

Interconnection at TELRIC rates, in turn, is one of the primary mechanisms by which the Act "uproot[s] the monopolies that traditional rate-based methods had perpetuated" and thereby "jump-start[s]" competition in the telecommunications industry. *Verizon*, 535 U.S. at 488. Congress recognized that it would not be sufficient simply to preempt regulatory barriers to entry; new entrants would also require the ability to reach the customers of other networks. The interconnection requirement in Section 251(c)(2) allows a new entrant to compete without bearing the prohibitive cost of duplicating the whole array of facilities that constitute an incumbent's preexisting network (or the unregulated cost of obtaining access to an incumbent's customers, where the incumbent is willing to provide it). In essence, the interconnection requirement provides a new entrant with the ability to make calls to, and receive calls from, all of the consumers on the incumbent's network; an entrant with only a small network of its own can thereby sell telecommunications services that reach all consumers.

Permitting incumbents to charge higher rates than TELRIC rates for facilities used for interconnection would run counter to those legislative objectives. Thanks to their longstanding monopoly power, incumbents have built extensive networks that include ample facilities to which competitors can connect their networks. It is incongruous to suggest that, despite the seemingly undisputed existence of such incumbent-provided facilities, competitors should nevertheless either pay higher rates for those facilities or provide duplicate facilities of their own. It is equally difficult to maintain that the purposes of the Act are served by respondent's cramped interpretation of Section 251(c)(2), which would apply TELRIC rates only to the relatively low-cost, inconsequential facilities within an incumbent's office (*e.g.*, the "cross-connect"), instead of the entire facility connecting the two networks. To implement the Act's "novel ratesetting" approach only to the "last inch" of facilities used for interconnection would neuter legislation intended to be "radically unlike all previous statutes." *Verizon*, 535 U.S. at 489.

The difference between TELRIC and non-TELRIC rates, moreover, is substantial. Sprint recently conducted a nine-State survey examining the relationship between TELRIC rates and non-TELRIC rates for facilities used for interconnection. For a T1 connection, non-TELRIC rates are 75% higher on average than TELRIC rates; for a T3 connection, non-TELRIC rates are 63% higher. Those figures belie the proposition that a competitive market exists for facilities used for interconnection with incumbents' networks. And the additional resources that competitors will have to devote to interconnection facilities if the court of appeals' decision is upheld would necessarily be diverted from the deployment of new services and technologies—in contravention of the Act's objective of "accelerat[ing] rapid[ ] private sector deployment of advanced telecommunications services." H.R. Conf. Rep. No. 458, *supra*, at 113.

2. The court of appeals' approach threatens to entrench the competitive advantages of incumbent carriers. Interconnection links two networks for the mutual exchange of traffic; it inheres to the benefit not only of the networks but of consumers, and thus enhances overall consumer welfare. See *Verizon*, 535 U.S. at 490 n.11 (noting that "any value [of a network] to customers would be exponentially increased with the interconnection of more users to the network"). Although both competitors and incumbents benefit from interconnection, however, they do not benefit equally; it remains in the economic interest of incumbents to inhibit or deny interconnectivity to competitors such as Sprint. Where a competitor has a smaller customer base, the incumbent can raise the price of facilities used for interconnection, knowing full well that the competitor must agree to that price or suffer a severe competitive disadvantage (because its customers will have a greater need to connect with the incumbent's more numerous customers than vice versa).

For Sprint, the consequences of unrestrained costs of interconnection are particularly severe. As both a provider of wireless telephone service and a wholesaler of local telephone service to cable companies, Sprint's dependence on interconnectivity is substantial. In addition, Sprint's two largest competitors in the wireless market, AT&T and Verizon, own a majority of the Nation's incumbent carriers—and therefore control access to a substantial portion of the Nation's local telephone network.[8] If the court of appeals' decision is upheld, AT&T and Verizon will have the ability to harm Sprint's standing in the wireless market by the unfettered raising of the cost of connecting to their local wireline customers.

Unlike those companies, Sprint lacks substantial legacy networks developed by historical monopolies. In order to compete, therefore, Sprint relies on the combination of interconnectivity and the deployment of new services and technologies. Sprint invests substantial resources in developing new products, improving service quality, and expanding the reach of its own network. If it can efficiently interconnect with incumbents' networks, Sprint can continue to devote resources to those efforts, to the benefit of its customers and consumer welfare more generally.

Congress's objective in the Telecommunications Act of 1996 was "not just to balance interests between sellers and buyers, but to reorganize markets by rendering regulated utilities' monopolies vulnerable to interlopers" and thereby "give aspiring competitors every possible incentive to enter [new] markets." *Verizon*, 535 U.S. at

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[8] Of the seven original "Baby Bells" that resulted from the AT&T breakup, AT&T has purchased four (including respondent) and Verizon has purchased two.

489. By ensuring that competitors such as Sprint can obtain access to facilities used for interconnection at TELRIC rates, the FCC's interpretation gives greatest measure to that objective, thereby fulfilling congressional intent. This Court should reverse the court of appeals' outlying decision and hold that the FCC's interpretation is entitled to deference.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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AMICUS CURIAE BRIEF

10

Nos. 10-313 & 10-329

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IN THE

Supreme Court of the United States

TALK AMERICA INC.,

Petitioner,

v.

MICHIGAN BELL TELEPHONE CO.,
D/B/A AT&T MICHIGAN,

Respondent.

ORJIAKOR N. ISIOGU, COMMISSIONER, MICHIGAN
PUBLIC SERVICE COMMISSION, ET AL.,

Petitioners,

v.

MICHIGAN BELL TELEPHONE CO.,
D/B/A AT&T MICHIGAN,

Respondent.

ON WRITS OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF *AMICI CURIAE* OF UNITED STATES TELECOM ASSOCIATION AND NETWORK ENGINEERS IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICI CURIAE*[1]

The United States Telecom Association ("USTelecom") is a trade association representing companies offering a wide range of services across communications platforms, including voice, video and data over local exchange, long distance, wireless, Internet, and cable services. USTelecom's members range in diversity from large, publicly traded companies to small rural cooperatives. USTelecom has an interest in the correct interpretation of federal communications law and regulation, which interpretation should account for the technical realities that confront the industry. In carrying out its mission, USTelecom unites the industry to advocate on priority issues before all branches of federal and state government, including the judiciary. USTelecom has litigated or filed amicus briefs in many of the key cases interpreting and applying provisions of the Communications Act.

Also participating as *amici curiae* are four telecommunications network engineers ("Network Engineers"). Network Engineers collectively have more than 120 years of experience in the telecommunications industry. Although they are not presently employed by any incumbent local exchange carrier, these engineers have held management positions with, among others,

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[1] Pursuant to Supreme Court Rule 37.6, *amici curiae* and their counsel drafted this brief. No party or counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution to the preparation or submission of this brief. No person other than the *amici curiae* or their counsel made a monetary contribution to the brief's preparation or submission. All parties have consented to the filing of this brief and letters of consent have been lodged with the Clerk.

AT&T, Bell Atlantic, BellSouth, Qwest Communications, SBC, Southwestern Bell Telephone, and Verizon. They have been responsible for the planning, engineering, and operating of telecommunications networks as well as regulatory compliance and support. They also have witnessed first-hand how pivotal technology can be to regulatory classifications, which drive technology development, network deployment, and business operations. A list of engineers and their qualifications is set forth in the appendix hereto.

The legal questions in this case are intertwined with technical issues about telecommunications networks – how they are constructed and how they operate. While multiple courts have grappled with these issues, with the exception of the United States Court of Appeals for the Sixth Circuit, they have not always done so with technical precision. A decision that resolves this case based on an imprecise – or worse, incorrect – understanding of the underlying technical issues could have far-reaching, harmful effects on the telecommunications industry and the consumers it serves. *Amici Curiae* USTelecom and the Network Engineers share an interest in ensuring that the Court fully appreciates these underlying technical issues, which are neither self-evident nor simple. They thus respectfully offer this brief in an attempt to make these network issues more understandable to the Court.

SUMMARY OF THE ARGUMENT

The Court is no stranger to the Telecommunications Act of 1996, having been called upon to interpret the statute on several occasions.[2] Nor is the technology underlying today's telecommunications networks alien to the Court.[3]

Nonetheless, the issue in this case – the proper regulatory treatment of "entrance facilities" under the Act – requires a more detailed understanding of telecommunications network architecture. Lower courts have struggled with the technical aspects of the questions before them, and unfortunately, the technical descriptions of entrance facilities and the network diagrams offered by the petitioners obscure some important technical issues. The purpose of this brief is to explain certain technical concepts, in order to provide a more complete and helpful description of entrance facilities and their use in telecommunications networks.[4]

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[2] *See, e.g., AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366 (1999); *Verizon Commcn's Inc. v. FCC*, 535 U.S. 467 (2002).

[3] *See Verizon Commc'ns*, 535 U.S. at 490-91 (describing the "physical incarnation" of the local exchange market); *see also id.* at 541 (Breyer, J., dissenting in part) (offering an example of an incumbent local telephone company's major switching center "in downtown Chicago, from which cables and wires run through conduits or along poles to subsidiary switching equipment, other electronic equipment, and eventually to end-user equipment, such as telephone handsets, computer modems, or fax machines located in office buildings or private residences").

[4] *Amici curiae* do this by reference to terms, concepts, and diagrams that have appeared or been discussed in this and other proceedings. The Network Engineers also provide practical

The brief also clarifies several important points that the petitioners and their *amici* in support misconstrue. Specifically, and notwithstanding their claims to the contrary, separate entrance facilities are not deployed for the purpose of exchanging traffic and backhauling. Likewise, backhaul does not merely involve the routing of traffic to and from a single carrier's customers; rather backhaul allows the placement of any kind of telephone call to any kind of customer. Finally, the deployment of entrance facilities, which can be miles in length, involves activities that are fundamentally different from the steps that an incumbent carrier must take to facilitate interconnection.

ARGUMENT

I. Introduction to the Local Telecommunications Network

A. Overview

As this Court correctly observed, the telecommunications network is analogous to a "transportation network for communications signals, radiating like a root system from a 'central office' (or several offices for larger areas) to individual telephones, faxes, and the like."[5] Each central office serves a wire center, which represents the local geographic territory of an incumbent local exchange carrier ("LEC").[6] Within

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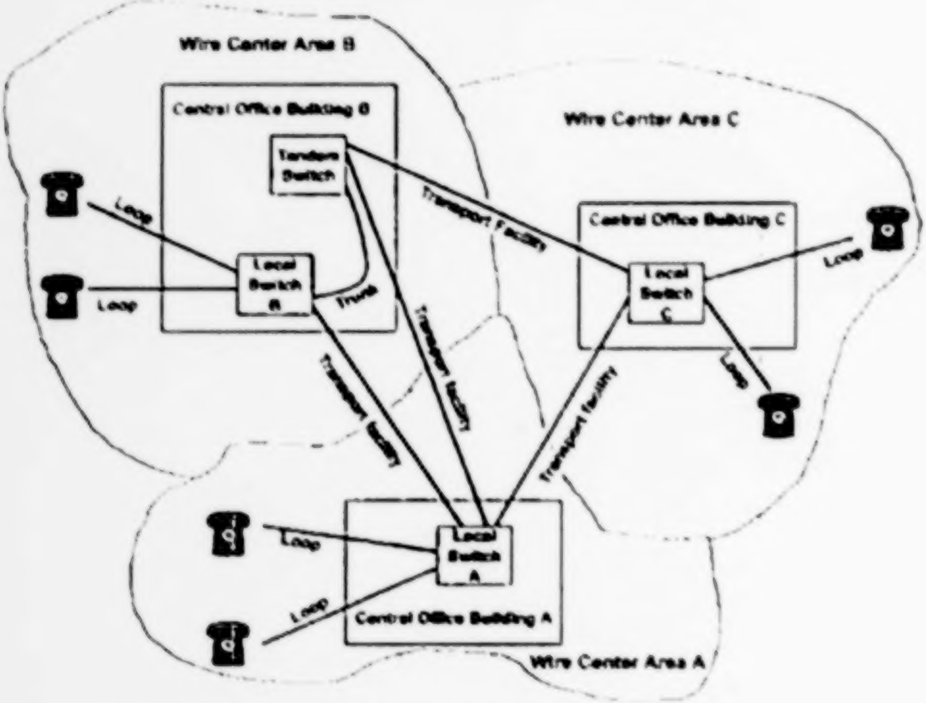
descriptions of various elements, practices and concepts based on industry standards and their professional experience.

[5] *Verizon Commc'ns*, 535 U.S. at 491.

[6] For example, the incumbent LEC or ILEC in the Washington, D.C. metropolitan area – Verizon – has approximately

each central office is the switching equipment, transport equipment, and cross-connect and power equipment used to serve the customers located within the wire center area. A local telephone customer obtains dial-tone on his or her telephone by means of a local loop connected to a local switch located in the wire center's central office.[7] All incumbent LEC customers located within the same wire center area have local loops connecting their homes or offices to the incumbent LEC's central office building serving that wire center area. Figure 1 is a diagram of an incumbent LEC's local telecommunications network.

FIGURE 1:
Incumbent Local Network



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60 individual wire center areas in the Virginia, Maryland and Washington, D.C. area.

[7] Each customer's "telephone number" resides on the local switch to which the customer's loop is connected.

Local Loop. In its simplest form, a local loop is physically a pair of wires running from the customer premises to the incumbent LEC's central office. A local loop may be made of copper wires (contained in a series of connected copper cables) for its entire length from the customer's premises to the central office. A local loop also may be a combination of copper wires and fiber optic strands. In this arrangement, copper wires connect the customer's premises to a digital loop transport (carrier) system that converts multiple copper lines (analog) into a digital format, combines (multiplexes) them together, and transports them to the central office over high capacity transport facilities, which typically consist of fiber optic cables.[8]

Local Switch. The local switch (also referred to as an end office switch) provides dial-tone to the customer's telephone using a loop facility (*i.e.*, dial-tone loop). It also provides various calling features such as three-way calling, call forwarding, and call waiting. The local switch interprets the digits dialed by the customer and makes call connections to other customers served by that same switch. Local switches are connected by interoffice circuits referred to as "trunks" that allow telephone calls to be completed to and from customers in different wire centers and served by different central offices.[9]

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[8] *See, e.g.*, Telcordia Notes on the Networks, Telcordia Technologies Special Report, SR-2275, Issue 4, §§ 12.1.1, 12.13, 12.6 & 12.7 (Oct. 2000) ("*Telcordia Notes*"). Alternatively, a local loop may consist entirely of fiber optic strands, an arrangement often referred to as "fiber-to-the-home."

[9] *See, e.g.*, *id.*, § 4.1.3.1. The function of completing calls to and from customers served by other switches is referred to as "routing" or "call routing."

Trunk. A trunk is a circuit that connects two switches. A switch makes the connections between the loops and trunks that it serves. For example, in Figure 1, for a call from a customer in wire center A to a customer in wire center B, the local switch in wire center A would establish a connection from the originating dial-tone loop to a trunk connecting local switch A to local switch B; the switch in wire center B would complete the call connection by connecting the incoming trunk from local switch A, to the dial-tone loop of the customer served by local switch B. A single trunk is used for one phone call for the duration of that call. When the telephone call is concluded, the trunk is released for use for the next call from a customer served by local switch A to a customer served by local switch B. For a telephone call between two customers served by the same local switch, no interoffice trunk is used.[10]

Tandem Switch. A tandem switch is a "specialty" switch that only makes connections between trunks and other switches. A tandem switch does not directly serve customers who originate or terminate calls. Instead, the tandem switch handles the intermediary function of connecting trunks carrying calls originated and terminated in other switches. In Figure 1, a tandem switch is shown located in Central Office B. In a local calling area with many local switches, a local switch may not have trunk connections directly to all the other local switches because low traffic volumes do not justify such direct connections. In this situation, a tandem switch is used for completing calls when direct trunks between a specific pair of switches do not exist. For example, in Figure 1, there are no direct trunks between local switch B and local switch C. In this case, a phone call from a customer served by local switch B to a customer served by local switch C would be made using a trunk from local switch B to the tandem switch. The tandem switch would complete the connection (call path) between its trunk from local switch B and its trunk to local switch C and the customer served by local switch C. Additionally, tandem switches are also used for alternate call completion paths between a pair of switches if the direct trunks between that pair of switches are all temporarily busy (that is, are in use for other calls).[11]

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[10] *See, e.g., id.*, §§ 4.1.3.1, 4.1.3.7 & 7.2.1.4.

Trunk Group. A trunk group is a homogenous quantity of trunks (typically in building blocks of 24 trunks) between two specific switches that are configured to operate together. For example, a trunk group of 96 trunks between two local switches would be capable of handling up to 96 simultaneous voice telephone calls between customers served by those switches. In an incumbent LEC's local network, particularly between a local switch and a tandem switch, the network may be configured with more than one trunk group between the same pair of switches. When this occurs, the different trunk groups are typically set up to carry different types of calls. For example, one trunk group would be used only for local calls, while the other trunk would be used only for long distance calls.[12]

Signaling Equipment. Generally speaking, signaling is the exchange of control information (dialed digits, customer billing numbers, and the like) used to set up and take down calls between switching systems. Older vintages of signaling used the same circuit that would ultimately carry the call to convey signaling information. Modern switching systems use a signaling system (typically Signaling System 7 or "SS7") in which the signaling information is conveyed in separate pathways from the voice traffic. With SS7, also referred to as Common Channel Signaling ("CCS"), signaling information is conveyed without first using the trunk over which the call will be placed, which increases performance, reduces costs, and facilitates various calling services.[13]

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[11] *See, e.g., id.*, § 4.1.3.3.

[12] *See, e.g., id.*, § 4.1.3.1.

B. Interconnection of Telecommunications Networks

Customers served by different telecommunications carriers cannot place telephone calls to one another unless the networks of the carriers serving those customers are interconnected. Interconnection is the physical linking of two carriers' networks for the mutual exchange of traffic (that is, telephone calls).[14] Historically, carriers were under no legal obligation to interconnect their networks.[15] However, beginning in 1970, relying upon its authority granted under the Communications Act, the Federal Communications Commission steadily expanded the interconnection obligation for various services, including long distance and wireless.[16]

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[13] *See, e.g., id.*, § 6.2.3.

[14] First Report and Order, *Implementation of the Local Competition Provisions in the Telecomms. Act of 1996*, 11 F.C.C.R. 15,499, 15,590, ¶ 176 (1996) ("*Local Competition Order*").

[15] *See, e.g., Home Tel. Co. v. People's Tel. & Tel. Co.*, 141 S.W. 845, 848 (Tenn. 1911) (noting that, while telephone and telegraph companies are common carriers, "this does not mean that a telephone company is bound to permit another telephone company to make a physical connection with its lines").

Before the advent of competition in the local exchange market, incumbent LECs' local networks were interconnected to the networks of long distance carriers or interexchange carriers ("IXCs"), which permitted the origination and termination of long distance calls to and from the incumbent LEC's local customers. Long distance carriers operate what is called a Point of Presence ("POP"), which is analogous to the incumbent LEC's central office. A long distance carrier's POP may contain both the physical switching and transport equipment owned by the carrier, or may only contain transport equipment that is connected to the long distance carrier's switch that physically resides in a different (distant) location.[17] Interconnection with a long distance carrier's switch is accomplished by building trunk groups from

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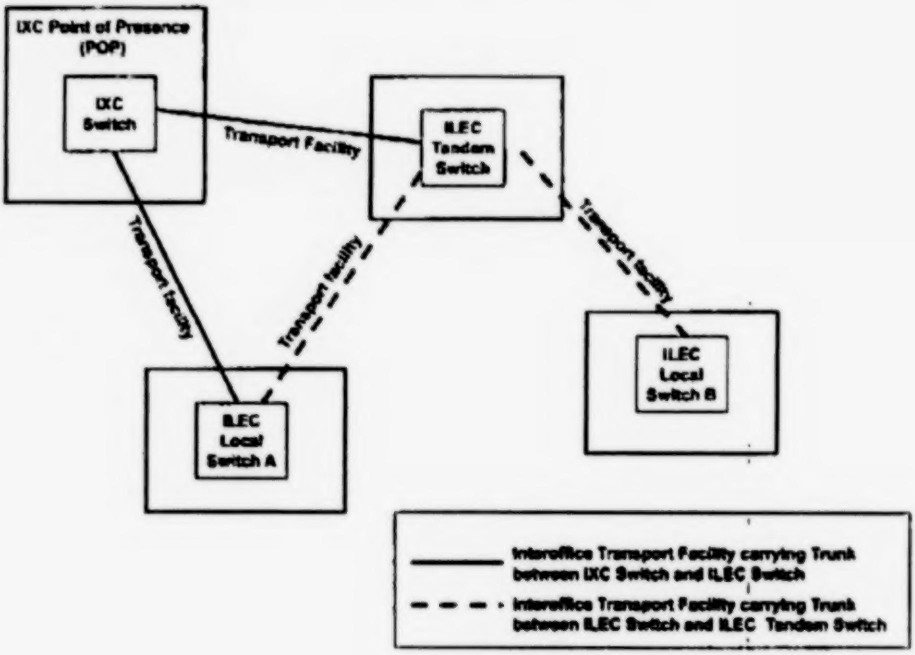
16. *See, e.g.*, Notice of Inquiry to Formulate Policy, Notice of Proposed Rulemaking and Order, *Establishment of Policies and Procedures for Consideration of Applications To Provide Specialized Common Carrier Services in the Domestic Public Point-to-Point Microwave Radio Service and Proposed Amendments to Parts 21, 43 and 61 of the Commission's Rules*, 24 F.C.C.2d 318, 347, ¶ 67 (1970) ("If access to local facilities is requested and needed by the applicants, we would expect the local carrier . . . to permit interconnection or leased channel arrangements on reasonable terms and conditions to be negotiated with the new carriers."); Decision, *Bell System Tariff Offerings of Local Distribution Facilities for Use by Other Common Carriers*, 46 F.C.C.2d 413, 422, ¶ 16 (1974), *aff'd sub nom. Bell Tel. Co. of Pa. v. FCC*, 503 F.2d 1250 (3d Cir. 1974); Report and Order, *An Inquiry into the Use of the Bands 825-845 MHz and 870-890 MHz for Cellular Communications Systems*, 86 F.C.C.2d 469, 496, ¶¶ 55, 57 (1981).

17. *See, e.g.*, *Telcordia Notes*, § 4.1.4.

that switch to the incumbent LEC's tandem switch and, if a long distance carrier so chooses, from the switch to one or more of the incumbent's local (end office) switches. Figure 2 is a diagram of direct interconnection between an incumbent LEC's local network and the network of a long distance carrier.[18]

FIGURE 2:
ILEC Interconnection with Interexchange Carrier (IXC)


IXC Point of Presence (POP)
IXC Switch
Transport Facility
ILEC Tandem Switch
Transport facility
Transport facility
Transport facility
ILEC Local Switch A
ILEC Local Switch B
Interoffice Transport Facility carrying Trunk between IXC Switch and ILEC Switch
Interoffice Transport Facility carrying Trunk between ILEC Switch and ILEC Tandem Switch

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[18] As depicted in Figure 2, the IXC has trunks riding on the transport facilities to the incumbent's tandem switch as well as trunks to the incumbent's local switch A but no direct trunks to the incumbent's local switch B. In this arrangement, long distance calls to or from the incumbent's customers served by local switch B would only be sent (routed) to the long distance carrier through the incumbent's tandem switch. An IXC typically has trunks to each incumbent's tandem switch in each LATA (Local Access and Transport Area), which are geographic areas created by the

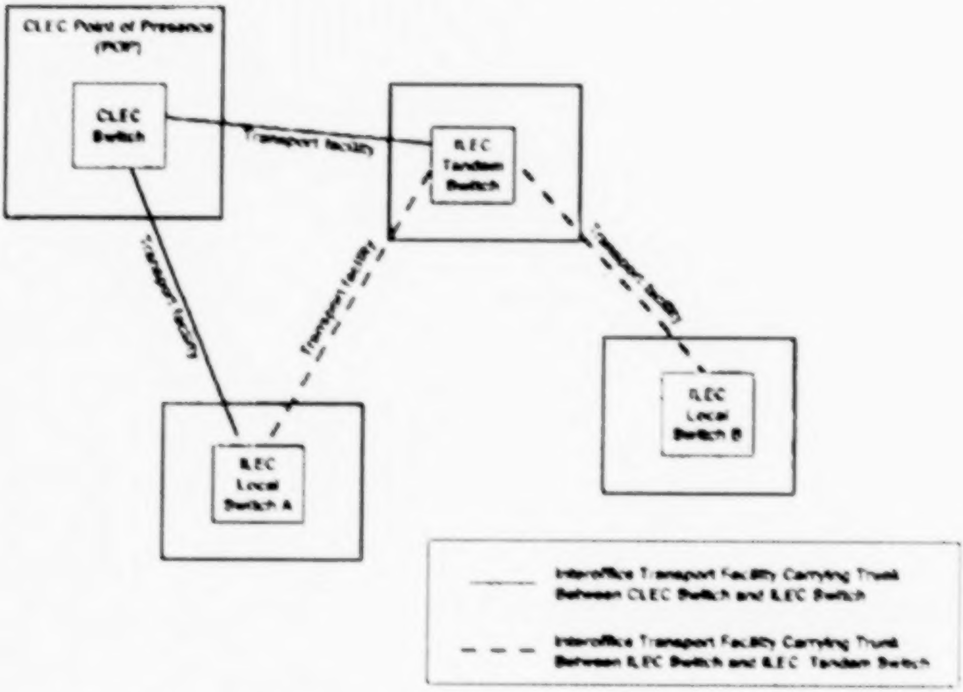
With enactment of the 1996 Act, and the opening of the local market to competition, competitive local exchange carriers (also referred to as competing LECs or "CLECs") were given the right to interconnect their networks with the incumbents' networks.[19] As is the case with long distance carriers, a competing LEC operates a POP that may contain its physical switching and transport equipment or just transport equipment that is connected to the competing LEC's switch physically residing elsewhere. The technical arrangements used to accomplish interconnection between a competing LEC's switch and the incumbent's central office are very similar to the technical arrangements used to interconnect a long distance carrier's switch and the incumbent's central offices. Figure 3 is a diagram of direct interconnection between an incumbent LEC's local network and the network of a competing LEC.[20]

Modification of Final Judgment. *See United States v. AT&T*, 552 F. Supp. 131 (D.D.C. 1982), *aff'd sub. nom. Maryland v. United States*, 460 U.S. 1001 (1983); *United States v. W. Elec. Co.*, 569 F. Supp. 990 (D.D.C. 1983). However, depending upon call volume and other factors, the IXC could choose to have direct trunks to some, all, or none of the incumbent's local switches in a LATA.

[19] *See* 47 U.S.C. §§ 251(a), 251(c)(2). The use of the term "CLEC" in this context also includes providers of Commercial Mobile Radio Service ("CMRS"). *See Local Competition Order* at 16,000, ¶ 1015.

[20] Under 47 U.S.C. § 251(a), a competitor has the option to interconnect "indirectly" with an incumbent LEC. When two carriers interconnect indirectly, there is no immediate physical connection between their networks. Rather, each carrier's network is connected to the network of a third carrier that serves as an intermediary between the originating and terminating carriers.

FIGURE 3:
ILEC Interconnection with Competitive
Local Exchange Carrier (CLEC)


CLEC Point of Presence (POP)
CLEC Switch
Transport facility
ILEC Tandem Switch
Transport facility
Transport facility
Transport facility
ILEC Local Switch A
ILEC Local Switch B
Interoffice Transport Facility Carrying Trunk Between CLEC Switch and ILEC Switch
Interoffice Transport Facility Carrying Trunk Between ILEC Switch and ILEC Tandem Switch

The location that represents the actual point where the network of one carrier (for example, a competing LEC) is physically connected to the network of another carrier (for example, an incumbent LEC) is called the point of interconnection ("POI").[21] FCC rules implementing the 1996 Act provide that each carrier is responsible for maintaining and operating the physical facilities and equipment on its respective "side" of the POI.[22] At the POI, connections generally referred to as "cross-connects" are made to physically link the networks. Cross-connects may be made between copper wires owned by the competing

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[21] *See, e.g., MCImetro Access Transmission Servs., Inc. v. BellSouth Telecomms., Inc.*, 352 F.3d 872, 875 (4th Cir. 2003).

[22] *See* 47 C.F.R. § 51.701.

LEC to copper wires owned by the incumbent, or between a coaxial cable owned by the competing LEC to a coaxial cable owned by the incumbent, or between a fiber optic strand owned by the competing LEC to a fiber optic strand owned by the incumbent. The different possible physical media (copper wire, coaxial cable, or fiber optic cable) are a function of the speed and nature (e.g., analog format or digital format) of the signals transmitted over the particular medium. Typically, the POI and the necessary cross-connect hardware equipment needed to make the physical connections are located inside the incumbent's central office.

C. Digital Transport Systems and Fiber Optics

Beginning with Alexander Graham Bell, a telephone call was transmitted as a continuously modulated (analog) electrical signal over a pair of copper wires. With the advent of digital technology, it became more cost effective to convert analog signals to digital signals (a stream of 0's and 1's), combine the digital signals from a number of analog lines, and transport the combined digital signals over a greater distance. At the distant end, the digital signals are uncombined and converted back into individual analog signals, at which point each individual call would typically travel over a single pair of copper wires to be completed.

The electronic equipment that converts signals from analog format to digital format and combines and uncombines the digital signals is called a multiplexer (often referred to as a "mux"). A digital transport system typically includes a pair of multiplexers (each located at different, distant locations) connected and dedicated to each other. The digital transport system transmits combined digital signals between the pair of connected multiplexers, as the individual analog signals enter and exit the multiplexers at each end.

In North America, standards evolved such that the analog signal for one voice grade telephone call is converted into a digital signal operating at a speed of approximately 64,000 bits/second. This 64 kilobits per second (64 kbps) signal is referred to as a Digital Signal – Level 0 ("DS-0") signal. A related "digital hierarchy" was developed to standardize the digital building blocks for combining and uncombining digital signals. In this hierarchy, the signals for 24 analog lines (or 24 telephone calls, or 24 DS-0s), are combined into a single digital signal called a DS-1. The speed (bandwidth) for a DS-1 is approximately 1.5 megabits/second. The standard for the next step – the combining of DS-1s – is a DS-3. A DS-3 accommodates 28 DS-1 signals multiplexed together. The speed (bandwidth) for a DS-3 is approximately 45 megabits/second. A single DS-3 can carry 28 DS-1s, or 672 simultaneous telephone lines/calls (*i.e.*, 24 x 28). DS-1 and DS-3 digital circuits (as well as larger capacity circuits) are often referred to as "pipes," since they carry multiple digital signals.

Starting in the 1980s, incumbents began deploying digital transport systems over fiber optic facilities and continued to do so extensively, as the technological capacity and capabilities of these systems expanded dramatically. A Fiber Optic Transport System is made up of fiber optic multiplexers (sometimes referred to as fiber optic terminals) connected together by glass fiber optic strands. In an incumbent LEC's local network, fiber optic cables (containing the fiber optic strands) are deployed both in the loop portion of the network, as well as in the interoffice network, where the fiber optic cables run between the incumbent LEC's central office buildings. In a broad sense, fiber optic multiplexers are similar to the early digital multiplexers. Lower speed (capacity) electrical and optical digital signals enter the fiber optic multiplexer, are combined into a higher speed (higher capacity) digital fiber optic signal, which is then transmitted as a high speed digital light (optical) signal between the fiber optic multiplexers connected together in the Fiber Optic Transport System. At each fiber optic multiplexer location, lower speed electrical and optical signals may be combined or uncombined as they enter or exit the Fiber Optic Transport System.

Synchronous Optical Network or "SONET" standards refer to a set of standards developed for the interoperability of different Fiber Optic Transport Systems. SONET standards include an "optical digital hierarchy" standardizing the building blocks for combining and uncombining optical circuits. In the SONET hierarchy, an OC-1 (Optical Channel 1) digital optical circuit is roughly equivalent to a DS-3 digital electrical circuit. Further steps in the optical hierarchy are the OC-3, OC-12, OC-48, etc. Using these building blocks, an OC-48 SONET Fiber Optic Transport System, for example, operating at an overall digital signal speed of about 2.5 gigabits per second, would carry the capacity of 48 DS-3s between the fiber optic multiplexers in the system, or the equivalent of 32,256 simultaneous analog telephone calls/lines.[23]

Because of the standard building blocks for combining and uncombining electrical and optical digital signals, and its extremely large capacity, a Fiber Optic Transport System usually carries an aggregation of numerous individual circuits from a large number of different origination and termination points. Typically, a Fiber Optic Transport System simultaneously carries trunks to various carrier switches (incumbent, competing, and long distance carriers) and a variety of non-switched point-to-point circuits (for example, circuits for non-switched DS-1 and DS-3 services). In a sense, the Fiber Optic Transport System is like a large multi-lane interstate highway, with the circuits (pipes) on that system representing lanes on the highway that carry a wide variety of types and sizes of traffic; multiplexers are analogous to the interchanges where varied traffic smoothly enters and exits the high capacity system.

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[23] *See, e.g., Telcordia Notes*, § 14.15.

In the incumbent's local network, interoffice Fiber Optic Transport Systems are configured between central office buildings using a number of different physical architectures. These architectures may include rings, point-to-point, and hub and spoke configurations. Consequently, an individual DS-1 or DS-3 interoffice circuit may traverse multiple Fiber Optic Transport Systems between the circuit's origination point and its termination point.[24] For example, in Figure 1, a DS-1 trunk group between local switch A and local switch C may be transported first over a fiber optic system using glass strands in a fiber optic cable running from central office A to central office B, and then over another fiber optic system using glass strands in a fiber cable running from central office B to central office C. Back to the interstate highway analogy, this would be like driving on I-495 and then I-395 to go from Northern Virginia to downtown Washington D.C.

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[24] *See, e.g., id.*, § 14.15.3.1-.6.

D. Entrance Facilities

An entrance facility is a dedicated fiber optic transport system connecting a competing LEC's POP to an incumbent's central office.[25] An entrance facility consists of a fiber optic cable containing fiber strands that extends between the competing LEC's POP and the incumbent's central office and connects to a pair of SONET fiber optic multiplexers, one located at the competing LEC's POP and the other inside the incumbent's central office.

In essence, an entrance facility is the first (or last) transport link for numerous and various longer circuits running from the competing LEC's POP. The entrance facility aggregates together and transports these different individual circuits between the competing LEC's POP and the incumbent's central office. The entrance facility typically terminates at a location in the incumbent's central office that allows circuits riding the entrance facility to fan out to different destinations (end points) throughout the incumbent's local network. As a result, an entrance facility will frequently carry trunks bound for different incumbent local switches, trunks to other carrier switches, as well as various non-switched circuits – all across the same dedicated transport system. Figure 4 is a diagram of typical competing LEC entrance facility.

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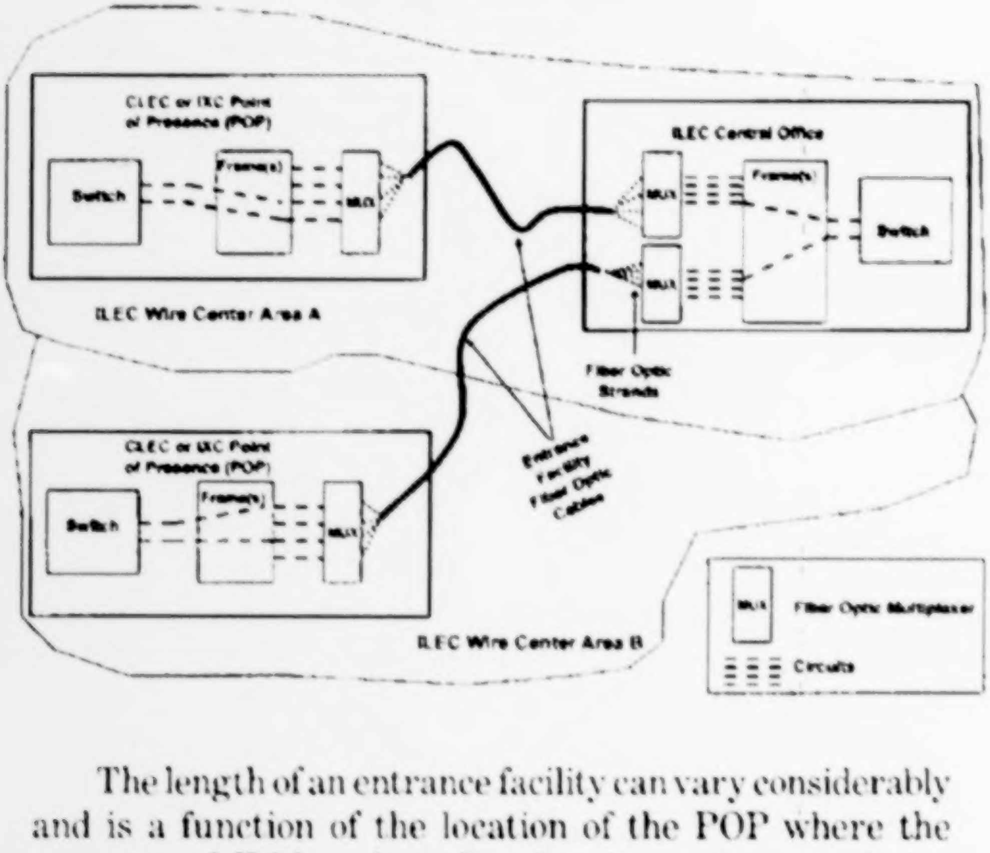
[25] Long distance carriers also use entrance facilities to connect to an incumbent LEC's central office and entrance facilities may be used to connect buildings or office campuses, but this discussion focuses on the use of entrance facilities by competing LECs given the issues before the Court. *See* 47 C.F.R. § 69.2(qq) (defining "entrance facilities" as "transport from the interexchange carrier or other person's point of demarcation to the serving wire center").

FIGURE 4:
Entrance Facility



The length of an entrance facility can vary considerably and is a function of the location of the POP where the competing LEC has elected to place its equipment relative to the incumbent's central office. Generally, most entrance facilities are less than five miles in length, although some can be considerably longer. Where the incumbent's central office and competing LEC's POP are located in close proximity, an entrance facility can be less than the length of a single city block.

As a point of reference, Figures 5 and 6 are maps of the Atlanta, Georgia metropolitan area and the Atlanta downtown sector, respectively.[26] These maps depict the location of AT&T's central office on Courtland Street in Atlanta (where AT&T is the incumbent) as well as the location of various competing LEC switches. Because the Courtland Street central office is located in the downtown Atlanta business district, many competing LECs connect their switches to the Courtland Street central office. As reflected on Figures 5 and 6, the length of an entrance facility necessary to connect each of the competing LEC's switches to the Courtland Street central office could vary from almost one city block to nearly 18 miles.[27]

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[26] Figures 5 and 6 were prepared by GeoResults, a national telecommunications database marketing and consulting firm. GeoResults maintains the GeoSwitch™ Database, which is a national listing of all building locations that it has identified as having one or more wireline telecommunications switches. Figures 5 and 6 do not include switches of CMRS providers in the Atlanta area.

[27] One competing LEC's switch is collocated in AT&T's Courtland Street central office. Collocation, which is a method of interconnection, does not require ILEC-provided entrance facilities. In addition, for those competing LEC switches located in the outlying locations from downtown Atlanta, the competing LEC may elect to use entrance facilities to connect to the nearest AT&T central office and rely upon AT&T's interoffice transport to reach from that central office to AT&T's Courtland Street central office.

FIGURE 5:
CLEC Switch Locations —
Metro Atlanta

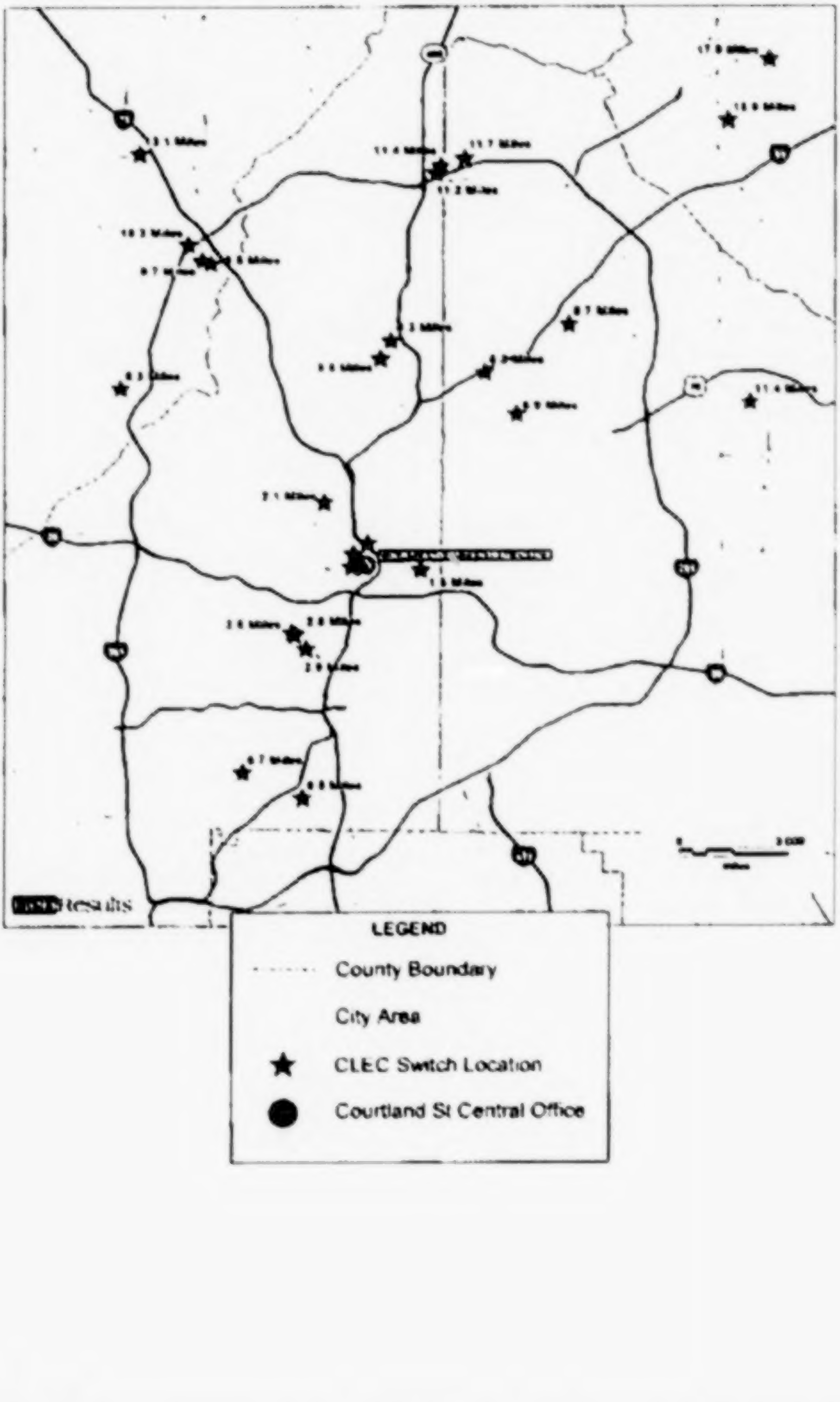
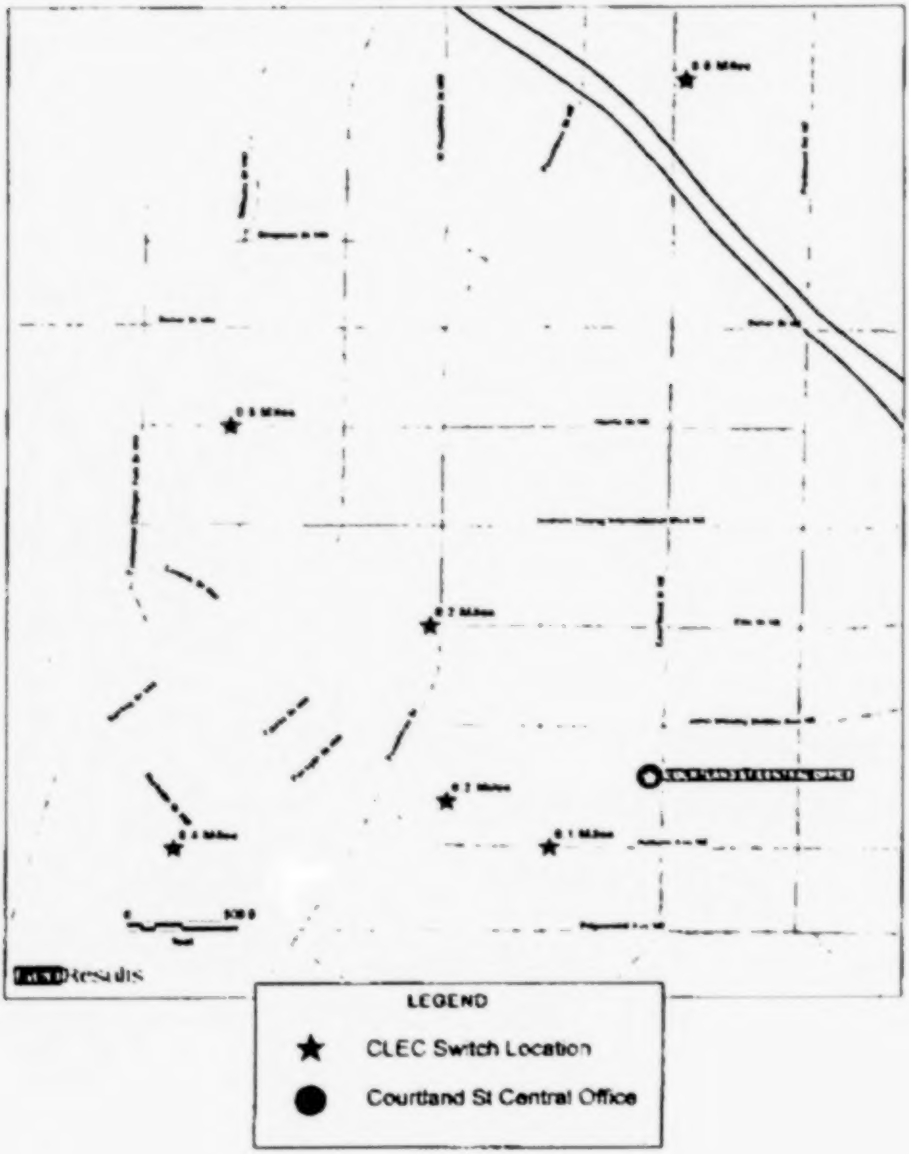


Figure 6:
CLEC Switch Locations — Downtown Atlanta



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A competing LEC can construct entrance facilities itself or obtain them from the incumbent or a third party.[28] The construction of new entrance facilities where such facilities do not presently exist is a costly and time-consuming exercise, whether the construction is done by the CLEC, the ILEC, or a third party. For example, one incumbent LEC's typical interval for deploying new entrance facilities is 120 business days, provided that the incumbent has fiber optic cables already located near the competing LEC's POP. Even longer intervals are involved if significant additional fiber cable construction is required.

Although not exhaustive, the following work activities generally are required when the incumbent deploys a new entrance facility (some of which are performed by the competitor): (i) preparing environmental building space at the competing LEC's POP; (ii) placing or expanding cross-connect equipment at the competing LEC's POP, which may include additional cable or equipment racking and riser cable facilities; (iii) installing and constructing power equipment and power connections to operate the multiplexer at the competing LEC's POP; (iv) designing and engineering the Fiber Optic Transport System based on a service forecast provided by the competing LEC; (v) constructing the fiber transport system from the incumbent's central office to the competing LEC's POP, which may require obtaining various permits to the extent that work in the public rights of way is required;

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[28] *See* Order on Remand, *Unbundled Access to Network Elements; Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 20 F.C.C.R. 2533, 2610, ¶138 (2005) ("*Triennial Review Remand Order*").

(vi) ordering fiber optic multiplexers from the equipment vendor; (vii) installing the fiber optic multiplexers after delivery; (viii) splicing the fiber optic cable segments from the incumbent's central office to a location near the competing LEC's POP; (ix) splicing or placing fiber optic cables into the competing LEC's POP; (x) placing and splicing intra-building fiber optic cables by the incumbent within the competing LEC's POP to reach the exact location of the fiber optic multiplexer; (xi) testing and turning up both fiber optic multiplexers (in the incumbent central office and the competing LEC's POP) as a single system; and (xii) installing alarm and monitoring circuits to the system (for remote surveillance and operations).

Some of these activities may be performed in parallel, although a number of them must be performed sequentially.[29] The same activities are required if the competing LEC or a third party is deploying the new entrance facility.

Once construction of a new entrance facility is complete, additional work would be required to install the various individual circuits that are transported across the entrance facility. For example, a competing LEC could order from the incumbent DS-3 and DS-1 transport circuits for service and the trunks that ride on those DS-3 and DS-1 circuits. Upon receipt of these service orders, the incumbent would place additional electronic equipment on either end of the entrance facility in order to activate the required circuits and trunks.

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[29] For example, fiber optic multiplexers cannot be activated and tested until a complete fiber optic path is constructed from the competing LEC's POP to the incumbent's central office, and fiber optic multiplexers cannot be installed in the competing LEC's POP until HVAC, structural loads, fire suppression, electrical bonding and grounding, floor space, and power is available.

An entrance facility is not the only method to provide the "transport link" between a competing LEC's POP and an incumbent's central office. Another method is meet point interconnection, which involves both the competing LEC and the incumbent LEC building their own fiber optic cables to an intermediate location between the competing LEC's POP and the incumbent's central office. Fiber strands from the competing LEC's fiber optic cable are connected to fiber strands from the incumbent's fiber optic cable at this intermediate location. Both the competitor and incumbent bear their own costs of deploying the fiber optic cables (and the strands therein) on their respective side of the intermediate location and the fiber multiplexer located at their respective end of the fiber optic transport system. The meet point fiber optic transport system is then operated jointly by the competitor and the incumbent.[30]

E. Backhaul

The need for backhaul typically arises when a competitor leases an unbundled loop from the incumbent but provides the customer served by that loop with dial tone from the competitor's switch located elsewhere. Backhaul occurs when a competitor's customer's dial-tone line connection (that is, the circuit from the customer's premises to the competitor's switch) is transported across an entrance facility connecting the incumbent's central office to the competitor's POP. Figure 7 is a diagram of typical backhaul arrangement.

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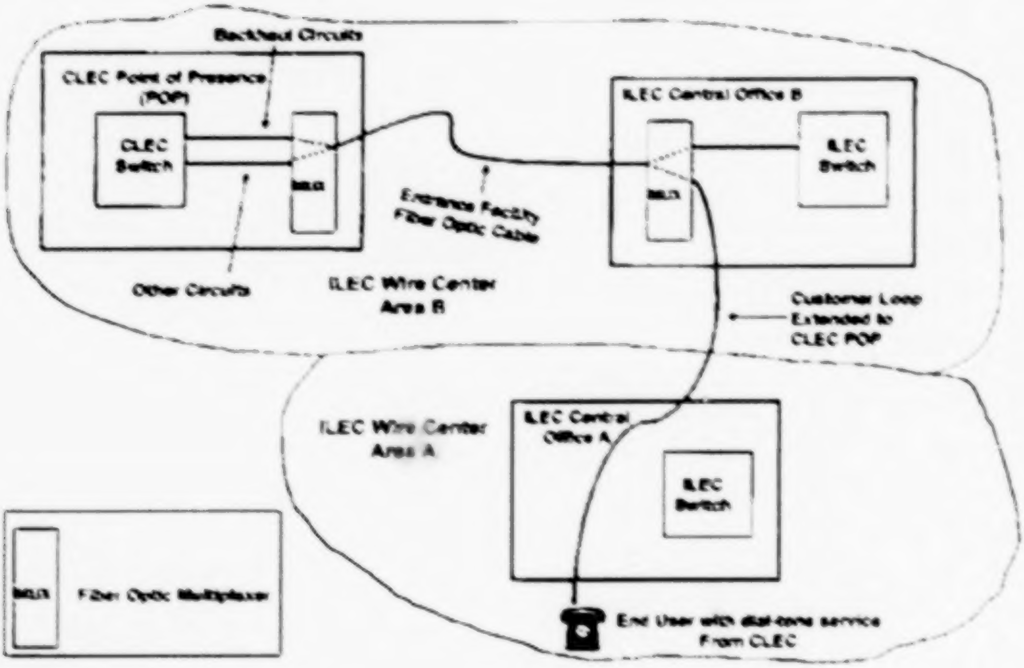
[30] According to the FCC, unless the parties agree otherwise, the point of interconnection in a meet point arrangement is a point inside the incumbent's central office – such as on the incumbent's "main distribution frame" or "trunk-side of the switch." *Local Competition Order* at 15,781, ¶ 553.

FIGURE 7:
Backhaul Arrangement



In Figure 7 the competitor's customer is located in the incumbent's wire center A. The competitor's switch that provides dial tone to this customer is located in its POP, which is in incumbent wire center area B. The competitor's customer's dial-tone line connection from the customer's premises to the competitor's switch runs through the incumbent's central office A, to the incumbent's central office B, where it is connected in the incumbent's central office B to the entrance facility running from the incumbent's central office B to the competitor's POP.

What distinguishes Figure 7 as a backhaul arrangement is that the competitor's customer's dial-tone line connection is transported across the entrance facility from the incumbent's central office B to the competitor's switch located in its POP. The entrance facility that provides the "backhaul link" for the competitor's dial-tone customer in wire center area A is the same Fiber Optic Transport System (i.e., the same fiber multiplexers and fiber cables) that also transports trunks from the competitor's switch to the incumbent's switches, transports trunks from the competitor's switch to the switches of other carriers, and transports non-switched circuits to and from the competitor. All of these circuits and services are aggregated together across the same entrance facility.

II. Clarification of Network Issues

Against this technical backdrop, the petitioners and their *amici* in support misconstrue several important points regarding entrance facilities. The same is true of those appellate courts that have held that incumbents must provide entrance facilities under 47 U.S.C. § 251(c)(2).

A. Separate entrance facilities are not deployed for the exchange of traffic and backhaul purposes.

In their filings and as reflected in diagrams submitted with or referenced in their briefs, the petitioners erroneously suggest that different entrance facilities exist to accommodate separately interconnection and backhaul.[31] From a network engineering (and cost) standpoint, the same fiber optic cable that contains the fiber strands and the pair of multiplexers comprising the entrance facility is installed and used for both interconnection and backhaul. The same fiber cable and multiplexer pair that transport trunks to and from various carrier switches (interconnection) also would transport competing LEC customers' dial-tone line connections across the entrance facility (backhaul). Given the time and expense of deployment, it is almost inconceivable from a network design (and cost) standpoint that an entrance facility would ever be deployed "solely for backhauling."[32]

That the same entrance facility is used both for interconnection and backhaul underscores a pricing problem that neither the petitioners nor their supporting *amici* address. That is, under their view, an incumbent LEC would be required to provide an entrance facility to a competing LEC at rates established under the Total Element Long Run Incremental Cost (TELRIC) methodology when the CLEC ostensibly seeks to use the entrance facility for interconnection purposes. However, once the incumbent has designed, engineered, and constructed the fiber transport system and installed and activated the fiber optic multiplexers, the competing LEC could readily establish circuits for backhaul purposes that would ride that same TELRIC-priced entrance facility. Thus, while readily acknowledging that competing LECs should not be able to obtain an entrance facility at TELRIC when used for backhaul, the petitioners and their supporting *amici* ignore that this would be the inevitable result if the Court were to agree with their position in this case.

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[31] *See, e.g.*, Michigan Public Service Commission Br. at 23 (providing a diagram that depicts two separate entrance facilities, one for backhaul and the other for interconnection); California Public Utilities Commission Br., Appendix 1 (same); Talk America Br. at 26.

[32] Michigan Public Service Commission Br. at 21; *see also* COMPTEL Br. at 16 (claiming that "the CLEC is entitled to TELRIC pricing" when the entrance facility is "used for the transmission and routing" of traffic "between the ILEC and the CLEC" but not when that facility is used for backhauling).

It is no answer to argue, as the California Public Utilities Commission erroneously does, that an incumbent can prevent, on a call-by-call basis, the use of an entrance facility for backhaul purposes.[33] An incumbent has no such capability. Calls made by competing LEC's customers whose dial-tone line connections to its switch are backhauled across an entrance facility never touch an incumbent's switch before those calls reach the competing LEC's switch. The incumbent is not involved in the routing of their calls. Under these circumstances, the incumbent cannot detect, let alone screen out, individual calls that involve backhaul on an entrance facility.

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[33] *See* California Public Utilities Commission Br. at 6-7; *see also Illinois Bell Tel. Co. v. Box*, 526 F.3d 1069, 1071-72 (7th Cir. 2008) ("The state commission tells us that ILECs can detect and block any attempted use of an entrance facility for backhauling. (Every carrier, ILEC or CLEC, must be able to determine the traffic's destination in order to route it accurately.)"); *Pacific Bell Tel. Co. v. Cal. Pub. Utils. Comm'n*, 621 F.3d 836, 842 n.8 (9th Cir. 2010) ("Incumbent LECs are capable of screening out calls that would be used for backhauling. A computer identifies the destination of the call, and, if the call is bound for a customer of the competitive LEC, the computer can screen out the call."), *petition for cert. pending*, No. 10-838 (filed Dec. 23, 2010).

Equally unsatisfactory is the government's attempt to blunt the regulatory arbitrage that would inevitably result if the petitioners were to prevail by seeking to limit this case to "existing" entrance facilities.[34] As Michigan Bell correctly notes, neither the underlying state commission order at issue nor the petitioners ever acknowledge, let alone embrace, this limitation.[35] Indeed, the government's distinction between existing and new entrance facilities is not endorsed by the California Public Utilities Commission – a state commission that has required incumbents to provide entrance facilities at TELRIC rates under section 251(c)(2) in a decision affirmed by the Ninth Circuit.[36] According to the California Commission, that requirement applies to "existing or new" entrance facilities.[37]

Furthermore, the government's reasoning is nonsensical. On the one hand, the government insists that incumbents should be required to provide *existing* entrance facilities at TELRIC rates because doing so is allegedly consistent with FCC and court decisions interpreting section 251(c)(2) to require incumbents under certain circumstances to "construct[] new facilities where none already exist."[38] On the other hand, the government argues that incumbents are not required to construct *new* entrance facilities where none exist because the FCC has yet to "rule" whether section 251(c)(2) imposes such an obligation.[39] This reasoning also overlooks that the "existing" entrance facilities at issue have been provided by the incumbent at TELRIC rates only because they were constructed at a time when the FCC's rules required that entrance facilities be "unbundled" under section 251(c)(3) – rules subsequently adjudged to be unlawful. Thus, under the government's reasoning, competing LECs would continue to enjoy the benefit of TELRIC rates for existing entrance facilities constructed by the incumbent under an unlawful regulatory regime, while competing LECs would not be entitled to TELRIC rates for new entrance facilities requested under the current regulatory regime.

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[34] United States Br. at 25 n.7.

[35] Michigan Bell Br. at 51.

[36] *See Pacific Bell*, 621 F.3d 836.

[37] California Public Utilities Commission Br. at 22.

[38] United States Br. at 23.

B. Backhaul does not just involve the routing of traffic from one competing LEC customer to another.

The petitioners erroneously claim that backhaul only involves the routing of traffic from one competing LEC customer to another.[40] The United States Courts of Appeals for the Seventh and Ninth Circuit made a similar error.[41] The reasoning underlying this claim appears to be that competing LECs should be entitled to obtain entrance facilities at TELRIC rates when they are used for interconnection because multiple carriers (and their customers) benefit from the arrangement; by contrast, a competing LEC is not entitled to obtain entrance facilities at TELRIC prices when they are used for backhaul because it only benefits the competing LEC (and its customers).[42] This reasoning is misguided for two reasons.

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[39] *Id.*

[40] *See, e.g.*, Michigan Public Service Commission Br. at 8-9, 21, 22, 24-25, 29, 35; Talk America Br. at 23, 26 (referring to backhaul as a CLEC "carry[ing] traffic to and from its end users"); *cf.* California Public Utilities Commission Br. at 5 (stating that backhaul involves the use of an entrance facility "to route traffic to and from a CLEC's end users located in the ILEC's service territory").

[41] *Illinois Bell*, 526 F.3d at 1071 ("Using an entrance facility to move voice or data traffic among CLEC customers has come to be known as 'backhauling.' . . ."); *Pacific Bell*, 621 F.3d at 842 ("In the case of backhauling, the competitive LEC uses the entrance

First, as noted above, the same entrance facility (transport system) is used both to exchange traffic and for backhaul. Second, backhaul involves the connection of a competing LEC customer's loop to the competing LEC's switch from which the customer draws dial tone that is transported over an entrance facility; it has nothing to do with calls placed to or by the competing LEC's customer with a "backhauled" dial-tone line. A competing LEC's customer with a "backhauled" dial-tone line can use that line to make any kind of telephone call, including long

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facility to permit its own customers to reach one another over the incumbent LECs network."); *see also Mich. Bell Tel. Co. v. Covad Commc'ns Co.*, 597 F.3d 370, 388 (6th Cir. 2010) (Sutton, J., dissenting) ("When used for backhauling, entrance facilities route traffic between two of the competitor's customers, likely because the competitor leases some elements of the incumbent's network, rather than between a customer of the competitor and a customer of the incumbent.").

[42] *See, e.g., Pacific Bell*, 621 F.3d at 847 ("Where a competitive LEC uses an interconnection facility for backhaul, only the competitive LEC benefits—both the originator and the recipient of the call are competitive LEC customers."); Michigan Public Service Commission Br. at 27 (arguing that with backhauling "the network that the competitive carrier creates is really its own"); *id.* at 28-29.

distance, and to call any kind of customer, including: (i) customers served by the same competitor (who may or may not also have a "backhauled" dial-tone line); (ii) customers served by a different competitor; (iii) customers served by the incumbent; and (iv) customers served by wireless carriers. In each type of telephone call, the circuit that is "backhauled" is the loop connection from the competing LEC's customer to the competing LEC's switch that is transported over the entrance facility, regardless of the origin or destination of that call.

C. Entrance facilities are fundamentally different from other steps that incumbent LECs must take to facilitate interconnection.

The petitioners and some of their supporting *amici* argue that requiring incumbent LECs to provide entrance facilities at TELRIC rates under 47 U.S.C. § 251(c)(2) is consistent with the duties imposed upon incumbent LECs to facilitate interconnection.[43] This argument is flawed.

First, while an incumbent may be required to "modify" its facilities "to the extent necessary to accommodate interconnection," such modifications are dissimilar to requiring an incumbent to provide a competing LEC with entrance facilities.[44] A good example of the "modifications" an incumbent LEC may be required to make to its network involves the situation when a competing LEC self-provisions an entrance facility or obtains that facility from a third party. In such a situation, the competing LEC or third party will run the entrance facility fiber optic cable to a manhole near the incumbent's central office, and the incumbent in turn will perform certain activities in order to connect the entrance facility to its network. These activities are depicted in Figure 8.[45]

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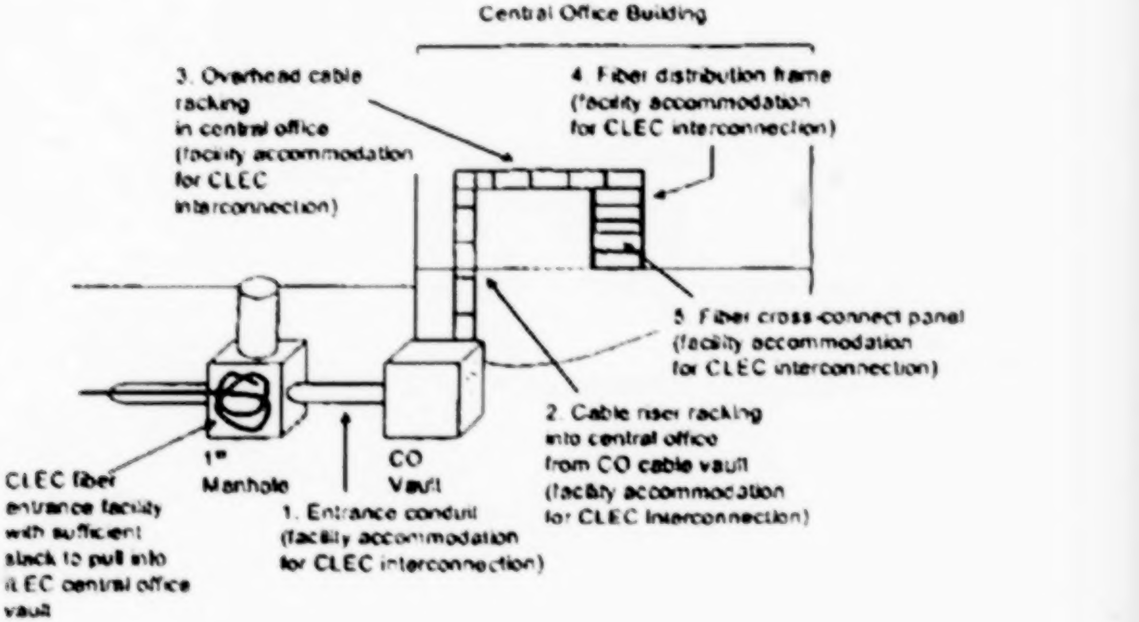
[43] *See* Talk America Br. at 32-33; Michigan Public Service Commission Br. at 29-32; United States Br. at 24-25.

[44] *Local Competition Order* at 15602-03, ¶ 198; *see also id.* at 15,605, ¶ 202 ("[T]he incumbent must accept the novel use of, and modification to, its network facilities to accommodate the interconnector."); *see* Michigan Public Service Commission Br. at 31 (arguing that "an obligation to modify facilities indicates a duty to build or change existing facilities").

FIGURE 8:
ILEC Network Modifications
to Accommodate Interconnection


Central Office Building
3. Overhead cable racking in central office (facility accommodation for CLEC interconnection)
4. Fiber distribution frame (facility accommodation for CLEC interconnection)
5. Fiber cross-connect panel (facility accommodation for CLEC interconnection)
2. Cable riser racking into central office from CO cable vault (facility accommodation for CLEC interconnection)
1st Manhole
CO Vault
CLEC fiber entrance facility with sufficient slack to pull into ILEC central office vault
1. Entrance conduit (facility accommodation for CLEC interconnection)

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[45] Figure 8 is reproduced from a brief filed with the Ninth Circuit in *Pacific Bell*. *See* Brief of Appellant AT&T California at 35, *Pacific Bell Tel. Co. v. Cal. Pub. Utils. Comm'n*, 621 F.3d 836 (9th Cir. June 27, 2008).

As reflected in Figure 8, to connect an entrance facility provided by a CLEC or a third party to the incumbent LEC's network, the incumbent will: (i) provide conduit in its cable vault through which to pull the competing LEC's fiber cable; (ii) furnish riser cables and overhead racking to extend the competing LEC's fiber cable into the incumbent's central office; (iii) terminate the competing LEC's fiber cable to a fiber distribution frame; and (iv) cross-connect the competing LEC's fiber cable with the incumbent's network.

All of the activities described above occur in the incumbent LEC's central office, and they largely utilize existing equipment and facilities in the incumbent LEC's network for which the competitor pays TELRIC rates. None of these activities are remotely comparable to the work required to provide a competing LEC with an entrance facility – namely, designing, engineering, constructing, and activating a new Fiber Optic Transport System. Indeed, the work necessary to deploy an entrance facility involves precisely the type of activities that the FCC has held an incumbent is not required to perform in connection with its unbundling obligations under Section 251(c)(3).[46]

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[46] Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 18 F.C.C.R. 16,978, 17,374, 17,381, ¶¶ 636, 648 (2003) (determining that "no incumbent LEC is obligated to build out facilities at TELRIC pricing" or to "trench or place new cables for a requesting carrier"), *vacated in part and remanded*, *United States Telecom Ass'n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004) (upholding determination that modification requirement does not include "construction of new wires").

Second, that the FCC requires an incumbent to establish meet point interconnection cannot reasonably be construed to require an incumbent to deploy entrance facilities at TELRIC rates.[47] In a meet point interconnection arrangement, "each party pays its portion of the costs to build out the facilities to the meet point."[48] Because a competing LEC must bear its own costs of construction of a meet point arrangement and because its ability to select the meet point location is constrained,[49] the competing LEC has little economic incentive to select a meet point that is located a considerable distance from its switch.[50]

However, these economic incentives would be seriously skewed if a competing LEC could obtain entrance facilities at TELRIC rates. For example, in Figure 5, the competing LEC switch located in Smyrna, Georgia is 8.3 miles from AT&T's Courtland Street central office. If the competing LEC operating that switch could pay TELRIC rates for

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[47] *See* Michigan Public Service Commission Br. at 30-31; United States Br. At 24 .

[48] *Local Competition Order* at 15,780-81, ¶ 553.

[49] *Id.* (noting that meet point interconnection requires only "some" "limited build-out of facilities" as an "accommodation of interconnection" and that "the appropriate distance that would constitute the required reasonable accommodation of interconnection" should be left to the parties and state commissions).

[50] *Cf. Triennial Review Remand Order* at 2611, ¶ 138 (noting that competing LECs "have a unique degree of control over the cost of entrance facilities" because "they often locate their switches close to the incumbent LEC's central office, minimizing the length and cost of entrance facilities").

AT&T to deploy and operate a fiber optic transport system that would cover the entire distance from Smyrna, Georgia to the Courtland Street, there would be little reason for the competing LEC to incur the actual cost of building out to a meet point and jointly operating a meet point arrangement.

Finally, in support of their claim that incumbents are required to provide entrance facilities in order to facilitate interconnection, the petitioners point to the incumbents' duty to provide "two-way trunking," which an incumbent must do upon request if technically feasible.[51] Trunks can be either one-way or two-way. On a one-way trunk, traffic is originated from only one side of the trunk, while traffic is originated from either side on a two-way trunk. However, like other circuits, a trunk rides on a transport facility, and the work required to provide two-way as opposed to one-way trunks on a particular transport facility is unrelated to and independent of the work required to design, engineer, and construct that transport facility. Provisioning one-way or two-way trunking is merely a matter of programming the two switches on either side of the trunk. Therefore, the activity involved in provisioning two-way trunks riding an entrance facility is grossly dissimilar as well as irrelevant to those required to deploy that transport facility, and the obligation to do the former cannot reasonably be used to justify the latter.

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[51] 47 C.F.R. § 51.305(f); *see* Talk America Br. at 33-34 (citing 47 C.F.R. § 51.305(f) in support of the argument that "the FCC has ruled that the right to interconnection includes a competitor's right to obtain a physical facility from the ILEC for use in transmitting, i.e., exchanging, traffic between the two networks"); Michigan Public Service Commission Br. at 31.

CONCLUSION

This Court has before it an important case that can shape incentives in the deployment of the nation's communications infrastructure. Upon careful evaluation of the regulatory interpretations put forth by the parties and *amici*, keeping in mind the technical realities faced by incumbent and competing carriers around the country, the Court should affirm the Sixth Circuit's decision.

Respectfully submitted,

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APPENDIX

APPENDIX — LIST OF NETWORK ENGINEERS

Donald E. Albert

Mr. Albert's telecommunications career spans more than 33 years. He has held positions with Verizon, Bell Atlantic, and the former C&P Telephone Companies. He has had a variety of assignments in engineering, operations, network planning, capital management, and sales. As Engineering Director of competitive LEC Implementation at Verizon, he was responsible for engineering issues associated with interconnection agreements between Verizon and competitive LECs, including the related modification and development of Verizon's engineering processes and procedures. He has testified as Verizon's engineering witness in approximately 100 proceedings before thirteen state regulatory authorities and the FCC involving Verizon's entry into the long distance market, Verizon and competitive LEC interconnection agreement arbitrations, and Verizon's TELRIC cost studies.

Mary T. Gray

Ms. Gray's telecommunications career spans more than 30 years. She had held positions with SBC and Southwestern Bell Telephone. As Director of Planning and Engineering at SBC, she coordinated federal and state regulatory filings involving networks, supported network projects with seven state public utility commissions, and formulated company policy and negotiated contracts with competing LECs.

W. Keith Milner
Mr. Milner's telecommunications career spans more than 40 years. He has held positions with, among others, Bell Communications Research, AT&T, and BellSouth. He has extensive experience in all phases of telecommunications network planning, deployment, and operations in both the domestic and international arenas. As Assistant Vice President, he testified before nine state regulatory authorities and the FCC on such issues as the technical capabilities of network facilities, new service offerings, expanded calling areas, unbundling of network facilities, and network interconnection.

Barry Orrel
Mr. Orrel's telecommunications career spans more than 22 years. Retiring as an Executive Director at Qwest Communications, he performed a variety of roles, including: Interoffice Facilities Planning Engineer, Central Office Toll Equipment Engineer, Digital Subscriber Loop Design Engineer, T1 Installation Project Manager, Interconnection Agreements Negotiator, and CLEC Collocation Project Manager. Additionally, he has provided oral and written testimony in various administrative jurisdictions, addressing such topics as network interconnection terms and conditions, support of engineering inputs for UNE loop TELRIC modeling, UNE unbundling, and wholesale loop installation/maintenance performance metrics.

AMICUS
CURIAE
BRIEF

9 Nos. 10-313 & 10-329 3-8-11

IN THE
Supreme Court of the United States

TALK AMERICA INC.
AND
ORJIAKOR N. ISIOGU, MONICA MARTINEZ, AND
GREG R. WHITE, COMMISSIONERS OF THE
MICHIGAN PUBLIC SERVICE COMMISSION,
Petitioners,
v.

MICHIGAN BELL TELEPHONE COMPANY
D/B/A AT&T MICHIGAN, ET AL.,
Respondent.

ON WRITS OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF FOR VERIZON AS AMICUS CURIAE IN SUPPORT OF RESPONDENT MICHIGAN BELL TELEPHONE COMPANY

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INTEREST OF AMICUS CURIAE[1]

The Verizon telephone companies ("Verizon") filing this amicus curiae brief are incumbent local exchange carriers ("ILECs") in more than 20 states. Therefore, like Respondent Michigan Bell Telephone Company, d/b/a AT&T Michigan ("AT&T"), Verizon is subject to 47 U.S.C. § 251(c)(2). Verizon has opposed efforts by competitive local exchange carriers ("CLECs") to convince state regulators, such as the Michigan commission, that section 251(c)(2) requires ILECs to provide their competitors with entrance facilities at extremely low rates determined using a methodology designed by the Federal Communications Commission ("FCC") known by the acronym "TELRIC." Verizon has a significant interest in the proper interpretation of its obligations under 47 U.S.C. § 251(c)(2), and this decision will have a direct effect on Verizon's operations as an ILEC throughout the country.

SUMMARY OF ARGUMENT

Verizon agrees with AT&T that section 251(c)(2) does not require incumbents to provide competitors with entrance facilities at TELRIC rates and that the Sixth Circuit accordingly should be affirmed. Petitioners and their *amici* seek to portray the availability of entrance facilities at TELRIC rates as a crucial building block for local telephone competition. But that could not be further from the truth. In fact, competition for telecommunications services is flourishing today not because of entities that use incumbent-provided entrance facilities obtained at TELRIC rates, but because of intermodal, facilities-based competitors such as cable companies, wireless carriers, and Voice over Internet Protocol ("VoIP") providers. Carriers that rely on TELRIC-priced incumbent facilities are at best fringe competitors, and, even as to them, the FCC has previously found that they can economically self-provide entrance facilities or obtain them from third parties. Thus, the claim that competition and consumers will be harmed if entrance facilities are not made available at artificially low TELRIC prices is incorrect.

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[1] No counsel for a party authored this brief in whole or in part, and no party or its counsel made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Verizon or its counsel made a monetary contribution to the preparation or submission of this brief. Letters from all parties consenting to the filing of this amicus curiae brief have been filed with the Court.

ARGUMENT

For the reasons set forth by AT&T, the Sixth Circuit correctly held that neither section 251(c)(2) nor any FCC order implementing that provision requires incumbent carriers to provide entrance facilities to competitors at TELRIC rates, and the arguments to the contrary by Petitioners and their *amici* are erroneous. As set forth below, that is confirmed by the fact that TELRIC-priced entrance facilities are not needed to fulfill the primary purpose of section 251—namely, to encourage local telephone competition.

I. REQUIRING INCUMBENT CARRIERS TO PROVIDE ENTRANCE FACILITIES AT TELRIC RATES UNDER SECTION 251(c)(2) WOULD NOT PROMOTE COMPETITION

Petitioners and their *amici* assert that section 251(c)(2) should be interpreted to impose a duty on incumbents to provide entrance facilities at TELRIC rates because that would serve the Act's purpose of encouraging the development of competition. But marketplace evidence demonstrates that incumbent-provided entrance facilities are not needed to foster competition.

1. In seeking to show that the Sixth Circuit's decision would harm competition, Petitioners and their *amici* substantially overstate what is at issue in this case. The Michigan commission's suggestion that the Sixth Circuit's decision requires competitors to "recreate an entire network" (Michigan Br. 32) is wrong. This case involves only the transport facility that connects two networks, not any of the other facilities that comprise a network. Competitors that choose not to engage in facilities-based competition can still lease unbundled network elements from incumbents under section 251(c)(3), and they have the right to resell incumbents' retail telecommunications services under section 251(c)(4).

Likewise, Sprint's paean to the importance of interconnection for competing carriers (Sprint Br. 25-26) misses the point. The right to interconnect is not in dispute here. Wholly apart from any alleged obligation to provide entrance facilities at TELRIC rates, *all* carriers are obligated "to interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers." 47 U.S.C. § 251(a)(1). And incumbents in particular must "provide, for the facilities and equipment of any requesting telecommunications carrier, interconnection with the [incumbent] local exchange carrier's network . . . at any technically feasible point within the [incumbent] carrier's network." *Id.* § 251(c)(2).

Petitioners and their *amici* nevertheless suggest that, absent a requirement for incumbents to provide entrance facilities at TELRIC rates under section

251(c)(2), competing carriers will be unable to interconnect with incumbent carriers because incumbents will be able to unilaterally raise entrance facility rates to supracompetitive levels. Sprint Br. 28; *id.* at 15 ("The court of appeals' approach would run counter to the objectives of the Telecommunications Act, because it would permit incumbents unilaterally to exact higher prices for facilities used for interconnection[.]"); CPUC Br. 15 (Sixth Circuit decision allows incumbents to "charge competition-dampening rates" (internal quotation marks omitted)).

But this is incorrect for at least two reasons. First, incumbents provide entrance facilities at tariffed rates, which are subject to regulatory oversight for compliance with the statutory "just and reasonable" standard at the federal level, 47 U.S.C. § 201(b), and with similar standards at the state level, *see, e.g.*, Mass. G.L. c. 159 § 14. As a result, incumbent carriers do not have unfettered discretion to raise rates for entrance facilities, and federal and state regulators retain the authority to address claims that incumbents are raising such rates to unreasonable levels.

Second, as the FCC already found when it eliminated incumbents' obligation to provide entrance facilities as unbundled network elements, competing carriers are *not* captive to incumbents for obtaining these facilities. Entrance facilities are nothing more than easily replicable high-capacity fiber optic cables that transport large amounts of traffic between two networks. They are "characterized by unique operational and economic characteristics" that "justify self-deployment by a competitive LEC."[2] Moreover, competitors "increasingly rely[] on competitively provided entrance facilities," which "are widely available."[3] Indeed, at least 28 different competitors have deployed fiber in the top 50 metropolitan areas in the country, for a total of over one hundred thousand local route miles of fiber.[4] In fact, Petitioner Talk America's parent company, PAETEC, owns thousands of these fiber route miles,[5] and last month reported to investors its "robust fiber network expansion."[6] Not surprisingly in light of this wide availability of fiber, the FCC has pointed to evidence showing that competitors often migrate from incumbent entrance facilities to those provided by other parties.[7] Verizon's own recent experience as both an incumbent and a competitive LEC confirms that competitors often self-provision entrance facilities or obtain them from third parties instead of leasing them from incumbents at tariffed rates.

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[2] Order on Remand, *Unbundled Access to Network Elements; Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 20 FCC Rcd. 2533, ¶¶ 138, 141 (2005) ("*UNE Remand Order*"), *aff'd*, *Covad Communications Co. v. FCC*, 450 F.3d 528 (D.C. Cir. 2006).

[3] *Id.* ¶¶ 139, 141.

[4] *See* Brogan & Leo, *High-Capacity Services: Abundant, Affordable, and Evolving* 24 (July 2009), *available at* http://www.ustelecom.org/uploadedFiles/News/News_Items/High-Capacity-Services.pdf.

[5] PAETEC Press Release, *PAETEC Completes Acquisition of Cavalier Telephone* (Dec. 6, 2010), *available at* http://www.paetec.com/about-us/media-center/press-releases/PAETEC-Completes-Acquisition-of-Cavalier-Telephone.html.

[6] PAETEC Press Release, *PAETEC Holding Corp. Announces 2010 Full Year and Fourth Quarter Results* (Feb. 17, 2011), *available at* http://www.paetec.com/about-us/media-center/press-releases/PAETEC-Holding-Corp-Announces-2010-Full-Year-and-Fourth-Quarter-Results.html.

[7] *UNE Remand* Order ¶¶ 138-139, 141.

Petitioners and their *amici* claim that the FCC's determination is irrelevant here because it was made in the context of evaluating the incumbent's duty to provide unbundled network elements under section 251(c)(3), not what they emphasize is the distinct interconnection duty under section 251(c)(2). *See* Gov't Br. 27-30; Comptel Br. 5-9, 13-14; Sprint Br. 16-17. But the FCC's conclusion that competitors are not impaired without access to entrance facilities as an unbundled network element rested on the *factual* finding that competitors can and do self-provide those facilities or obtain them from third parties. Because, as Comptel itself notes (at 13), the *same* physical entrance facility is implicated under both section 251(c)(2) and section 251(c)(3), the FCC's factual finding concerning the ready availability of entrance facilities remains true regardless of the purpose for which the competitor seeks to use those facilities.

In short, competing carriers have numerous options for obtaining the facilities they need to interconnect with incumbent networks apart from entrance facilities provided by incumbents. And rates for incumbent-provided entrance facilities are, in all events, subject to state and federal regulation to ensure they are provided on just and reasonable terms. Thus, the specter of unilateral entrance facility price increases by incumbents is no threat to competition at all.

2. Marketplace evidence confirms that entrance facilities at regulated TELRIC rates are not necessary for competition to thrive. In fact, competition is flour-

ishing today. Crucially, that competition is coming overwhelmingly from facilities-based providers that do not rely on entrance facilities provided by incumbents, including intermodal providers such as cable companies, wireless carriers, and VoIP providers that offer service over broadband connections. As a result of such intermodal competition, the number of incumbent traditional switched access lines declined by more than *10 percent* in the space of just *one year* from December 2008 to December 2009.[8]

Cable. Customers have been migrating rapidly from traditional wireline services offered by incumbent telephone companies to cable providers. As of September 2010, there were approximately 23.5 million cable voice subscribers, an increase of 18 percent over the 19.6 million subscribers at the end of 2008, and nearly four times the 5.9 million subscribers at the end of 2005.[9] Cable companies currently provide phone service to about one in every four wireline phone households in the U.S.[10] One study predicts that by 2015, cable companies will have captured more than 45 percent of revenues from consumers for wireline voice services.[11] Vigorous competition between cable companies and incumbent telephone companies has resulted in lower prices for consumers. Between the fourth quarter of 2004 and the second quarter of 2010, the average monthly price of unlimited local and long-distance voice service fell by 25 percent for telephone companies and 20 percent for cable operators.[12]

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[8] FCC, *Local Telephone Competition: Status as of December 31, 2009*, at 6, fig. 4 (Jan. 2011) ("*2009 Competition Report*"), *available at* http://www.fcc.gov/Daily_Releases/Daily_Business/2011/db0111/DOC-304054A1.pdf; FCC, *Local Telephone Competition: Status as of December 31, 2008*, at 5, fig. 3 (June 2010), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-299052A1.pdf (number of incumbent switched access lines went from 117,975,000 as of December 31, 2008, to 105,826,000 as of December 31, 2009).

[9] NCTA, *Industry Data: Operating Metrics* (as of September 2010), *available at* http://www.ncta.com/Statistics.aspx (citing SNL Kagan); NCTA, *Cable Phone Customers 1998-2009*, *available at* http://www.ncta.com/Stats/CablePhoneSubscribers.aspx (last visited Mar. 7, 2011).

Wireless. As the FCC has repeatedly found, "increasing numbers of mass market customers are subscribing to mobile wireless services," and "growing numbers of subscribers in particular segments of the mass market are choosing mobile wireless service in lieu of wireline local services."[13] As of June 2010, wireless carriers had a total of 292.8 million subscribers nationwide, or 93 percent of the U.S. population.[14] Approximately 99.6 percent of the U.S. population is served by one or more mobile voice providers, with 98.6 percent served by at least two and 95.8 percent by at least three.[15]

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[10] Rodriguez, *A Strong Showing in Phone Service Competition*, CableTechTalk Blog (Jan. 13, 2011), *available at* http://www.cabletechtalk.com/digital-phone/2011/01/13/a-strong-showing-in-phone-service-competition/.

[11] *See* Atlantic-ACM, *Wireless Wins, Wireline Wanes: U.S. Telecom Wired and Wireless Sizing and Share 2010-2015*, at 20 (2010).

[12] *See* Barden et al., Bank of America/Merrill Lynch, *Battle for the Bundle: Cable Keeps the Pressure on Telco* 14, tbl. 9 (July 20, 2010) (voice component of triple-play packages cost $40.19 per month for telephone companies and $35.33 for cable operators); Barden et al., Banc of America Securities, *Wireline Services Pricing Update* 8 (Oct. 8, 2004) (in 4Q 2004, voice component of triple-play packages cost $53.72 per month for telephone companies and $44.24 for cable operators).

[13] Memorandum Opinion and Order, *SBC Communications Inc. and AT&T Corp.*, 20 FCC Rcd. 18290, ¶¶ 89-90 (2005); Memorandum Opinion and Order, *Verizon Communications Inc. and*

Consumers have responded by increasingly substituting wireless voice service in place of wireline service.[16] As of June 2010, 42.5 percent of American households had either abandoned landline service altogether or still had that service but barely used it.[17] More than a quarter of American homes—26.6 percent—had completely "cut the cord" by June 2010, with another 15.9 percent using wireless phones for all, or

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MCI, Inc., 20 FCC Rcd. 18433, ¶¶ 90-91 (2005); *see also* Memorandum Opinion and Order, *AT&T Inc. and BellSouth Corp.*, 22 FCC Rcd. 5662, ¶¶ 95-96 (2007).

[14] CTIA, *Wireless Quick Facts*, *available at* http://www.ctia.org/advocacy/research/index.cfm/aid/10323.

[15] Fourteenth Report, *Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993; Annual Report and Analysis of Competitive Market Conditions with Respect to Mobile Wireless, Including Commercial Mobile Services*, 25 FCC Rcd. 11407, 11414 (2010).

[16] Memorandum Opinion and Order, *Petition of Qwest Communications International Inc. for Forbearance from Enforcement of the Commission's Dominant Carrier Rules*, 22 FCC Rcd. 5207, ¶ 38 (2007) ("[C]onsumers are increasingly finding that [wireless and wireline] services serve as substitutes.").

[17] Blumberg & Luke, National Center for Health Statistics, *Wireless Substitution: Early Release of Estimates from the National Health Interview Survey, January-June 2010*, at 2, 4 (Dec. 21, 2010), *available at* http://www.cdc.gov/nchs/data/nhis/earlyrelease/wireless201012.pdf.

almost all, of their calls.[18] Cord-cutting continued to grow in the second half of 2010, increasing to 29 percent of all households by the end of 2010, with analysts projecting that figure would rise to as much as 55 percent by 2015.[19] In sum, wireless substitution is increasing "at a remarkable rate," driven by more competitive pricing, better devices, macro pressures, and changes in consumer preference, particularly among younger users.[20]

VoIP. As the FCC has recognized, "over-the-top" VoIP services—which are offered for use over a consumer's broadband Internet connection—"are increasingly being used as a substitute for traditional telephone service," and such services "contribute to the marketplace discipline of voice telecommunications services."[21] Vonage, the largest over-the-top VoIP provider, has about 2.4 million subscribers, a more than 600-percent increase from December 2004.[22] Clearwire—a wireless broadband provider that also offers

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[18] *See id.* tbls. 1 & 5.

[19] *See* Flannery et al., Morgan Stanley, *Telecom Services: Wireless Substitution Reaches 26.6% in 1H10, Doubles Fixed-Line Only* 1 (Jan. 30, 2011).

[20] *Id.* at 3 (noting that about 51 percent of those 25-29 years old have cut the cord).

[21] Report and Order, *Preserving the Open Internet*, 25 FCC Rcd. 17905, ¶ 125 (2010).

[22] *See* Vonage Press Release, *Vonage Holdings Corp. Reports Fourth Quarter and Full Year 2010 Results* (Feb. 15, 2011), *available at* http://pr.vonage.com/releasedetail.cfm?ReleaseID=550145; Vonage Press Release, *Vonage Crosses 400,000 Line Mark* (Jan. 5, 2005), *available at* http://pr.vonage.com/releasedetail.cfm?ReleaseID=194545.

VoIP service over its 4G WiMAX network—already has approximately 1.1 million retail subscribers, and its network reached 119 million people by the end of 2010.[23] Providers such as Skype and Google also have seen skyrocketing numbers of VoIP users.

The upshot is that most competition for voice services is coming from intermodal, facilities-based entities that do not rely on incumbent, TELRIC-priced entrance facilities. Thus, any implication that TELRIC-priced entrance facilities are needed for competition to develop is contrary to marketplace reality. Indeed, the FCC itself has recognized that providers that rely on incumbent facilities in the form of unbundled network elements are little more than "fringe" competitors.[24] Even if some of those providers have business plans that depend on access to TELRIC-priced entrance facilities, the role of regulation is not to provide special protections to a preferred class of "fringe" competitors. Instead, the goal of any such regulation should be "the protection of competition not competitors."[25] And the evidence demonstrates that the absence of TELRIC-priced entrance facilities does not harm *competition*.

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[23] *See* Clearwire Press Release, *Clearwire Reports Record Fourth Quarter and Full Year 2010 Growth* (Feb. 17, 2011), *available at* http://investors.clearwire.com/phoenix.zhtml?c=214419&p=irol-newsArticle&ID=1530258&highlight=.

[24] Memorandum Opinion and Order, *Petition of Qwest Corp. for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Phoenix, Arizona MSA*, 25 FCC Rcd. 8622, ¶ 80 (2010).

[25] *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488 (1977) (emphases added; internal quotation marks omitted).

3. That conclusion is confirmed by the experience of states that have (rightly) concluded that section 251(c)(2) does not require incumbents to lease entrance facilities to competitors at TELRIC rates for purposes of interconnection. For example, in November 2005, the Ohio commission reached the same decision as the Sixth Circuit,[26] and competition in Ohio subsequently increased. The most recent data from the FCC show that the percentage of customer lines in Ohio served by a carrier other than the incumbent local exchange carrier (not including wireless carriers) almost doubled from 15 percent in December 2005 to 29 percent in December 2009.[27] Likewise, the July 2006 decision in Pennsylvania holding that entrance facilities should not be available at TELRIC prices[28] did not squelch competition: the percentage of non-ILEC lines stood at 20 percent as of June 2006 and then grew to 32 percent by

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[26] Arbitration Award, *Establishment of Terms and Conditions of an Interconnection Agreement Amendment*, No. 05-887-TP-UNC, 2005 WL 3018712, at 22-23 (Ohio PUC Nov. 9, 2005).

[27] *2009 Competition Report*, tbl. 8; FCC, *Local Telephone Competition: Status as of December 31, 2005*, tbl. 8 (July 2006) ("*2005 Competition Report*"), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-266595A1.pdf.

[28] Opinion and Order, *Petition of Verizon Pennsylvania Inc. and Verizon North Inc. for Arbitration of an Amendment to Interconnection Agreements with Competitive Local Exchange Carriers and Commercial Mobile Radio Service Providers in Pennsylvania Pursuant to Section 252 of the Communications Act of 1934, as Amended, and the Triennial Review Order*, No. P-00042092, 2006 Pa. PUC LEXIS 68, at *16 (Penn. PUC July 21, 2006).

December 2009[29]—again, without even counting wireless. A similar pattern is evident in other states.[30]

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The evidence therefore demonstrates that local telephone competition is flourishing without the availability of entrance facilities at TELRIC rates under section 251(c)(2). Indeed, because competitors have readily available alternatives to incumbent entrance facilities, requiring incumbents to make such facilities available at TELRIC rates creates a "disincentive to competitive LECs' infrastructure investment," which "hinder[s] the development of genuine, facilities-based competition" that the 1996 Telecommunications Act sought to foster. *UNE Remand Order* ¶ 218; *see also Illinois Bell Tel. Co.* v. *Box*, 548 F.3d 607, 610 (7th Cir.

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[29] *2009 Competition Report*, tbl. 8; FCC, *Local Telephone Competition: Status as of June 30, 2006*, tbl. 8 (Jan. 2007) ("*June 2006 Competition Report*"), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-270133A1.pdf.

[30] For example, in Nevada the percentage of non-incumbent lines (again, not including wireless) grew dramatically from 13 percent to 32 percent following the state commission's November 2005 decision not to price entrance facilities at TELRIC. Order, *Complaint, Nevada Bell Telephone Company, d/b/a/ SBC Nevada versus Various Competitive Providers of Telecommunications Services in Nevada to Resolve Dispute on Conforming Nevada Interconnection Agreements to Governing Law Under the Telecommunications Act of 1996*, No. 04-9019, 2005 WL 3610617, at *5 (Nev. PUC Nov. 16, 2005); *2009 Competition Report*, tbl. 8; *2005 Competition Report*, tbl. 8. Vermont saw a similar increase, from 12 to 27 percent. Opinion, *Petition of Verizon New England, Inc., d/b/a/ Verizon Vermont, for Arbitration of an Amendment to Interconnection Agreements*, No. 6932, 2006 Vt. PUC LEXIS 27, at *506-507 (Vt. Pub. Serv. Bd. Feb. 27, 2006); *2009 Competition Report*, tbl. 8; *June 2006 Competition Report*, tbl. 8.

2008) ("as long as requesting carriers rely on network services supplied by incumbent local exchange carriers, competition is hampered"); *United States Telecom Ass'n* v. *FCC*, 359 F.3d 554, 576 (D.C. Cir. 2004) (1996 Act was intended "to stimulate competition—preferably genuine, facilities-based competition"). Thus, far from promoting competition as regulatory proponents claim, incorrectly interpreting section 251(c)(2) as requiring the provision of entrance facilities at TELRIC rates would discourage competition and harm consumer welfare.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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